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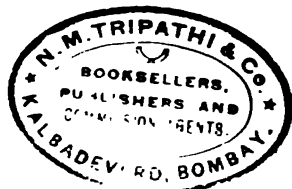
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LAW RELATING TO INJUNCTIONS

~~P212~~



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Tagore Law Lectures, 1897.

THE
LAW RELATING TO INJUNCTIONS
IN
BRITISH INDIA.

BY
JOHN GEORGE WOODROFFE, M.A., B.C.L.,

*Barrister-at-Law, one of His Majesty's Judges of the High Court of
Judicature at Fort William in Bengal.*

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PREFACE.

THIS volume and that on the law relating to Receivers in British India, already published, contain, with other matter, the Substance of the Tagore Law Lectures delivered by me in the University of Calcutta during the close of the year 1896, and the commencement of the following year.

In the preparation of this volume I have consulted and made use of the following English and American text-books: "A Treatise on the Law of Injunctions," by R. H. Eden (London, 1821); "The Law and Practice of Injunctions," by C. S. Drewry (London, 1849); "The Law and Practice of Injunctions in Equity and at Common Law," by W. Joyce (London, 1872); "The Law of Injunctions," by F. Hilliard, 3rd Edition (Philadelphia, 1874); "The Doctrines and Principles of the Law of Injunctions," by W. Joyce (London, 1877); "Kerr's Standard Treatise On the Law and Practice of Injunctions;" "A Treatise on the Law of Injunctions," by J. L. High, 3rd Edition (Chicago, 1890); "A Treatise on Extraordinary Relief in Equity and at Law," by T. C. Spelling (Boston, 1893).

It is hardly necessary to say that all these works (and particularly those published in the United States of America, in which country the jurisdiction by Injunction has been greatly extended to meet all the requirements of modern life) are of value to practising members of the profession for whom they were written. They, however, for the most part exhibit these branches of the Law of

Procedure in such a lengthy and detailed manner as to make it difficult for the beginner to grasp the general principles upon which it is founded. The present work is published, according to the intention of the Tagore Trusts, primarily, for students as were the lectures of which it is the outcome. While, therefore, I have cited all decisions of the Indian High Courts, which are not numerous, I have purposely abstained from crowding these pages with notes of English and American cases on matters of small detail and of unfrequent occurrence which the mere student does not require, but which may be found by the practitioner when wanted in the standard works already mentioned. Notwithstanding this, the present work will, I hope, prove to be of assistance to the profession also.

My endeavour has been to state general principles accurately to and explain them lucidly by the aid of selected decisions which are of authority and well in point. In this I have received much assistance from the Commentaries published by the late Mr. Justice Collett in 1882, and by Mr. Nelson in 1894, upon the Specific Relief Act (I of 1877), in which Act the Law relating to Injunctions and Receivers in British India is largely contained. The Indian practitioner is also referred to Mr. Nelson's Law of Injunctions in British India. In the preparation of this second Edition I have incorporated the cases decided and reported since the first.

1st Jan. 1906.

J. G. W.

ADDENDA AND CORRIGENDA.

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THE

LAW RELATING TO INJUNCTIONS

IN

BRITISH INDIA.

INTRODUCTORY.

- | | |
|--|--|
| <p>§ 1. STATUTE LAW RELATING TO THE SUBJECT IN INDIA :—</p> <p>(i) Present.</p> <p>(ii) Previous.</p> <p>§ 2. IS AND WAS FOUNDED ON THE ENGLISH LAW :</p> <p><i>The Shamnuggur Jute Factory Co. v. Ram Narain Chatterjee—Nusserwanji Merwanji Panday v. Gordon—Siddheswarri Dabi v. Abhoyeswari Dabi.</i></p> <p>§ 3. YET THE PECULIAR CIRCUMSTANCES OF THIS COUNTRY ARE TO BE CONSIDERED.</p> <p><i>Ram Chand Dutt v. Watson & Co.—</i></p> <p>§ 4. THE ISSUE OF INJUNCTIONS IS A FORM OF SPECIFIC RELIEF.</p> <p style="text-align: right;">W, I</p> | <p>§ 5. MEANING OF THE TERM "SPECIFIC RELIEF."</p> <p>§ 6. "PREVENTIVE RELIEF."</p> <p>§ 7. RELIEF BY—</p> <p>(i) Specific Performance.</p> <p>(ii) Injunction.</p> <p>(iii) Receiver.</p> <p>BELONG TO THE SAME BRANCH OF THE LAW :</p> <p>§ 8. BUT THERE IS A DISTINCTION BETWEEN THE REMEDIES.</p> <p>§ 9. GENERAL PRINCIPLE UPON WHICH AN INJUNCTION IS ISSUED.</p> <p>§ 10. "PROTECTIVE RELIEF."</p> <p>§ 11. THE GRANT OF PREVENTIVE OR PROTECTIVE RELIEF IS PURELY DISCRETIONARY.</p> <p style="text-align: right;">1</p> |
|--|--|

Present Sta-
tute Law re-
lating to the
subject in
India.

§ 1. The law relating to the issue of Injunctions in civil suits,¹ in British India,² is contained in the Civil Procedure Code³ and the Specific Relief Act,⁴ which supplements the Code, and occupies a middle ground between substantive law on the one hand, and procedure on the other.⁵ The granting of perpetual Injunctions is regulated by the Act, while temporary or, as they are sometimes called, interlocutory Injunctions, which are simply intended to preserve the *status quo* pending the decision, and which may be granted at any period of a suit, are treated as of the nature of procedure and are therefore regulated by the Code.

Previous law.

Both the earlier Codes (Acts VIII of 1859 and X of 1877) dealt with the subject of the issue of Injunctions.⁶ Act X of 1877, however, on this subject contained provisions of a more complete character,⁷ and which were, in fact, with some minor alterations,⁸ the same as those of the present Code. It introduced the provision as to

¹ The Criminal Procedure Code (Act V of 1898), ss. 142, 144 [see also s. 133] deals with the issue of Injunctions by Criminal Courts in cases of nuisance; and s. 88 with the appointment of Receivers of attached property. Specific relief, including therein the issue of Injunctions and the appointment of Receivers, cannot be granted for the mere purpose of enforcing a penal law. Act I of 1877, s. 7.

² That is, the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., cap. 106. See Act X of 1897 (General Clauses) s. 2 (8).

³ Act XIV of 1882, ss. 492—497 (Injunctions); ss. 503—505 (Receivers). As to the appointment of Receivers in insolvency under chap. xx; and under s. 503, of property under attachment, v. *post*. Sections 1 and

3 of the Code extend to the whole of British India. The other sections extend to the whole of British India, except the Scheduled Districts, as defined in Act XIV of 1874.

⁴ Act I of 1877, ss. 52—57 (Injunctions).

⁵ Specific Relief Bill. Statement of Objects and Reasons, *Gazette of India*, December 11, 1875.

⁶ See Act VIII of 1859, ss. 92, 93, 95, 96 (Injunctions), Act X of 1877, ss. 492—497 (Injunctions).

⁷ Sections 492, 493, 494, 496, 497 of Act X of 1877 and the present Code correspond with ss. 92, 93, 95, 96 of Act VIII of 1859. Section 495 was first inserted by Act X of 1877, which further made the additions to ss. 492, 493, which are mentioned in the text.

⁸ These occur in the sections relating to Receivers.

the issue of Injunctions where any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree,¹ as also in cases where the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors.² It further enacted that no attachment for breach of an Injunction should remain in force for more than one year.³ Prior to the establishment of the High Courts, the Supreme Courts of the Presidencies granted Injunctions following the principles and practice of the Court of Chancery in England.⁴

§ 2. The best guides in the matter of interference by way of Injunction have been judicially stated to be the principles which determine the action of Courts of Equity in England.⁵ It is, in fact, on these principles that

is and was founded on principles the same as those of English Law.

¹ Civil Procedure Code, s. 492, cl. (a); see *Brojendra Kumar Rai Chowdhuri v. Rup Lal Doss*, I. L. R., 12 Cal., 515, 517 (1886), in which it is pointed out that the present and preceding Codes have altered the law laid down in *Roy Luchmiput Singh Bahadur v. The Secretary of State for India*, 11 B. L. R., Ap. 27 (1873), and *Doorga Churn Chatterjee v. Ashootosh Dutt*, 24 W. R., 70 (1875).

² Civil Procedure Code, s. 492, cl. (b).

³ *Ib.*, s. 493, last paragraph.

⁴ See as to Injunctions, *Marsden v. Long*, Morton's Decisions, 242 (1800).

⁵ *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 284 (1881), *per Sargent, J.*, and see *ib.*, p. 279. And in *The Land Mortgage Bank of India v. Ahmedbhai Habbibhai and Kesouram Ramanand*, I. L. R., 8 Bom., 35, 67 (1883), it was said:—"In applying these provisions [Act I of 1877, s. 54, cl. (b), (c)] we shall do well to be guided by the decisions

of the Court of Chancery in England which, it cannot be doubted, are the source from which the above provisions have been drawn," *per Sargent, C. J.*, *Chunilal Mancharam v. Manishankar Atmaram*, I. L. R., 18 Bom., 616, 623 (1893); *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 488 (1894); *The Shamnuggur Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 189, 199, 200 (1886). Most of the many illustrations contained in the Specific Relief Act are taken from the English Equity Reports: see *Statement of Objects and Reasons*, *supra*. The first clause of s. 4 of the draft Specific Relief Bill provided that "except so far as they are embodied in this Act, the provisions of the law of England shall not be applicable to the kinds of relief hereinafter mentioned." But this clause was struck out by the Select Committee with the remark that "for some time at all events the rules of the Bill will have to be elucidated by

the relief given in Indian Courts by Injunction is, in the main,¹ founded; and this relief is, in substance, the same as that granted by Courts in England.² But since in India, the Courts must follow the words of the Statute,³ and since the rules for the guidance of Indian Courts are to be found in the Specific Relief Act, the English cases to which reference can be made are only of use as illustrative of the principles embodied in the sections of the Act from the aspect that the Courts of Chancery in England have had to treat matters of a similar description.⁴ Yet when there is no specific rule, the Mofussil Courts⁵ and Presidency High Courts (the latter in their appellate jurisdiction),⁶ will be guided by the English Case-law, so

reference to the decisions of the English Courts." Report of the Select Committee on the Specific Relief Bill. *Gazette of India*, November 25, 1876.

¹ The Indian law does diverge in points which will be found considered in the text. Thus it has been said that s. 57 of Act I of 1877 "does in some respects apparently depart from principles which guide Courts of Equity in England:" *per* Candy J., in *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702, 714 (1894).

² See the *Statement of Objects and Reasons*, *supra*, prefixed to Act I of 1877, Whitley Stokes *op. cit.* ii, 928-940, 939. *The Shamnuggar Jute Factory Co. v. Ram Narain Chatterjee*, *supra*; *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 214, 219 (1887); *Dhunjibhoy Cowasji Umrigar v. Lindon*, I. L. R., 13 Bom., 252, 259 (1888). ["It is to be remarked that this limitation of the power of granting an injunction [see Act I of 1877, s. 54, § 3 cl. (c)] is identical with the conditions upon which the Court of Equity in England has always asserted the jurisdiction of granting preventive relief in cases of this nature," *per*

Sargent, C.J.,]; so also the authorities relating to the issue of mandatory injunctions in light and air cases are to the same effect in India and in England: *Benode Coomaree Dossee v. Soudaminey Dossee*, I. L. R., 16 Cal., 252, 266 (1889); and the practice of the Court of Chancery in respect of affirmative agreements is adopted in s. 57, Act I of 1877; *Nusserwanji Mervanji Panday v. Gordon*, I. L. R., 6 Bom. (1881) at p. 280. See also cases cited in note (5), p. 3, *ante*.

³ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702, 711 (1894).

⁴ *Shadi v. Anup Singh*, I. L. R., 12 All., 436, 439 (1889), *per* Straight, J.

⁵ Act XII of 1887, s. 37 (Bengal, N.-W. P., and Assam Civil Courts); Act III of 1873, s. 16 (Civil Courts, Madras); *Chunilal Mancharam v. Manishankar Atmaram*, I. L. R., 18 Bom., 616, 623.

⁶ Letters Patent, 1862, s. 20; Letters Patent, 1865, ss. 20, 21 (Calcutta). The Letters Patent, originally establishing the High Courts at Madras and Bombay bear date the 26th June 1862, and are the same, *mutatis*

far as it is applicable, not because it is English, but because it is in accordance with that rule of equity and good conscience¹ which these Courts are, in such circumstances, enjoined to follow.² The Presidency High Courts, in the exercise of their ordinary original civil jurisdiction, may, in such circumstances, have recourse to the equitable jurisdiction which the High Courts have inherited from the Supreme Courts,³ which were in their turn vested with the general powers of the Court of Chancery.⁴ The law relating to Injunctions in this country being thus practically the same as that which prevails in England

mutatis, as those establishing the High Court at Fort William in Bengal (see Broughton's Civ. Pr. Code, Act VIII of 1859, 4th ed., pp. 381, 382; 7 Sevestre's Reports, App. 41). The Letters Patent, 1865, for the High Court at Madras are of the same date and similar in all respects to that for the High Court at Fort William, *mutatis mutandis* (see Broughton, 404). The Letters Patent, 1865, for the High Court at Bombay are of the same date and are in nearly every respect the same as those for the Presidencies of Bengal and Madras (see Broughton, 404 405). In regard to the Allahabad High Court (which has extraordinary original civil jurisdiction only), see Letters Patent, 1866, ss. 13, 14, which correspond to ss. 20 and 21 of the Letters Patent, 1865 (Calcutta).

¹ Equity and good conscience are "generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances: " *Waghela Rajsangji v. Shekh Masudin*, I. L. R., 11 Bom., 551, 561 (1887); *Maharaja Shri Ranmal Singji v. Vadilal Vakhatchand*, I. L. R., 20 Bom., 61, 69 (1896); see also *The Shamnuggar Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R.,

14 Cal., 189, 199, 200 (1886); *Callianji Harjivan v. Narsi Tricum*, supra., 713 (1894); *Chunilal Mancharam v. Manishankar Atmaram*, supra.

² See authorities cited in Note (5), p. 4, and Note (6), p. 4, *ante*.

³ *Blaquiere v. Ramdhone Das*, Bourke, 319 (1865); Letters Patent, 1865, s. 19, Letters Patent, 1862, s. 18 (Calcutta); *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76, 83 (1874); s.c. 22 W. R., 370; Morley's Digest, xxi; *Grose v. Amirtamayi Dasi*, 4 B. L. R., O. C. J., 1 (1869); s.c. 12 W. R., O. C., 13. As to the Letters Patent for Madras and Bombay, see Note 6, p. 4, *ante*.

⁴ See the Charter of Supreme Court, 26th March 1774, cl. 18 [Ordained that the Supreme Court be a Court of Equity with full power and authority to administer justice as nearly as may be according to the rules and proceedings of the Court of Chancery]. Smout and Ryan's Rules and Orders, vol. i. In 1726 the Common and Statute law at that time in force in England was introduced into the Indian Presidencies. See Clarke's Rules and Orders, Pref. iv. *Borrodaile v. Chainsook Buzigram*, 1 Hyde, 60, 61; s.c. 1 Ind. Jur., O. S., 70.

resort may be had to the English Case-law bearing on these subjects, and as the law of the United States is in general accordance with and founded upon English law, the decisions of the Courts of that country may also be referred to and cited in aid of the interpretation of the provisions contained in the Indian Codes and Acts.¹

The late Supreme Court of Bengal held that American decisions "are not authorities to which we must yield, as to the decisions of our own superior Courts; but they are in general well deserving of attention as able expositions of the law:"² and again, "with respect to the American decisions, they are not authority with us, though often extremely valuable as guides to the formation of a correct judgment."³

And more recently in England Cockburn, C. J., observed as follows:—

"The case before us presents itself, therefore, so far as our Courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically, to make, the law. I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decisions of the American Courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source

¹ *Malcolm v. Smith*, post; *Brad-
don v. Abbott*, post; *Scaramanga
v. Stamp*, post.

² *Malcolm v. Smith*, Taylor's Re-
ports, 283, 288 (1848), per Sir L.

Peel, C. J.

³ *Braddon v. Abbott*, ib., 342, 359
(1848), per Sir L. Peel, C. J. In this
and the case last mentioned Ameri-
can decisions were cited at the bar.

with our own, entitle their decisions to the utmost respect and confidence on our part.”¹

“The granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act. But those sections have never been understood as introducing new principles of law into India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience. It is necessary, therefore, to inquire on what principle the Courts have acted in England and in India.”²

The Sham-nuggur Jute Factory Co. v. Ram Narain Chatterjee.

And though the Specific Relief Act purports to deal only with perpetual Injunctions, leaving temporary Injunctions to be regulated by the Code, yet “apart from the special circumstances which determine whether the Court should, in its discretion, grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and these principles must, therefore, be sought in the Specific Relief Act itself.”³

Nusserwanji Merwanji Panday v. Gordon.

In a subsequent case in the Madras High Court⁴ the Chief Justice, though holding that it was not necessary to decide the point, observed that as regards s. 493 of the Code, the words of that section were quite general and that the granting of a temporary Injunction under the powers conferred by that section was a matter of

¹ *Scaramanga v. Stamp*, L. R., 5 C. P. D., 295, 303 (1880).

I. L. R., 18 Bom., 702, 713 (1894).

² *The Shamnugur Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 189, 199, 200 (1886), per Wilson and Porter, J. J.; approved in *Callianji Harjivan v. Nani Tricum*,

³ *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 279 (1881), per Sargent, J.

⁴ *Subba Naidu v. Haji Badsha Sahib*, I. L. R., 26 Mad., 168 (1902).

judicial discretion, and that if the Court which grants the Injunction rightly appreciates the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion: that having regard to the fact that the law with regard to the granting of a perpetual Injunction is to be found in the Specific Relief Act and is laid down with great precision, and that the law with regard to the granting of a temporary Injunction is to be found in the Civil Procedure Code and is declared to be a matter of discretion, if it were necessary to consider the point, he was not sure he would be prepared to go quite so far as Sir Charles Sargent. So it has been held that s. 56 of the Specific Relief Act does not affect injunctions in restraint of wrongful sale in execution of a decree under s. 492 of the Civil Procedure Code.¹ On the other hand the precise terms of s. 492 of the Code have been held to exclude the grant of an injunction in a case not falling within its express provisions.²

yet the peculiar circumstances of this country are to be considered.

§ 3. It must not, however, be overlooked that the circumstances of this country are, in many respects, very different from those of England. Not only may there be in India rights to be protected which are unknown to English law,³ but interests of which it does take cognizance

¹ *Amir Dulhin v. The Administrator-General of Bengal*, 1. L. R., 23 Cal., 351 (1895).

² See Ch. IV *post*; and *Jairam Das v. Zamon Lal*, 1. L. R., 27 Bom., 357 (1903).

³ Thus according to the usage of Gujarat an invasion of privacy is an infraction of a right for which the person injured has a remedy at law, and an injunction has been granted to restrain such invasion; *Manishankar Harqovan v. Trikam Narsi*, 5 Bom. H. C. R. (A. C.), 42 (1867); *Kuvarji Premchand v. Bai Javer*, 6 Bom. H.

C. R. (A. C.), 143 (1869); *Keshar Harkha v. Ganpat Hirachand*, 8 Bom. H. C. R. (A. C.), 87 (1871); but such an usage was held not to have been proved to exist in Dharwar; the Court, however, recognised the possibility in law of a custom similar to that of Gujarat existing elsewhere: *Shrinivas Udupirav v. Reid*, 9 Bom. H. C. R. (A. C.), 266 (1872). A right of privacy exists by custom in the N. W. P. among those Hindus and Mahomedans, who observe the custom of the purda, i.e., among all Hindus except those of the lowest castes and

may here require protection by Injunction, or otherwise, in sets of circumstances in which it is not necessary to grant relief in England, or the converse may be the case.¹

In the first of the cases now cited it was said :—“ With regard to the extreme proposition on the other side it is based upon the construction which the learned counsel placed upon English decisions. But, though, of course, the principles on which English Courts administer the remedy by injunction must be taken to be those which the Legislature meant to affirm in the Specific Relief Act, still the circumstances of this country are very different from those of England ; and it would be a dangerous thing to assume that, because the Courts in England have very rarely found it necessary to grant an injunction as between co-sharers in order to prevent multiplicity of suits, or upon any other grounds, Courts in this country may not properly be somewhat less rigid in doing so.”² So in the matter of rules of procedure and prac-

*Ram Chand
Dutt v. Wat-
son & Co.*

all Mahomedans except the poorest : *Gokul Prasad v. Radho*, I. L. R., 10 All., 358 (1888) ; [and see *Lachman Prasad v. Jamna Prasad*, I. L. R., 10 All., 162 (1887)]. The Chief Court of the Punjab has acknowledged that a custom of privacy can exist and can be enforced ; *ib.*, 382, and cases there cited. The decisions of the Calcutta Court are conflicting ; *ib.*, 382, and pp. 373—378, where such decisions are cited and considered, and *Bonode Coomaree Dossee v. Soudaminey Dossee*, I. L. R., 16 Cal., 252, 262 (1889). See also Act V of 1882 (Indian Easements), ss. 4, 18, ill. (b). The rule of English Law which is different (*Turner v. Spooner*, 30 L. J. N. S., 801, 803) has been followed by the Madras High Court ; *Komathi v. Gurunada Pillai*, 3 Mad. H. C. R., 141 (1886). *Sayyad Azuf v. Ameerubibi*, I. L. R.,

18 Mad., 163 (1894). See *Abdul Rahaman v. D. Emile*, I. L. R., 16 All., 69 (1893).

¹ *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 214, 220 (1887) : same case in appeal, I. L. R., 18 Cal., 10, 22 (1890) [rights of co-sharers] ; *Venkalacharyulu v. Rangacharyulu*, I. L. R., 14 Mad., 316, 323 (1890) [Marriage]. See remarks as to the modification of the ordinary right of easement in a town like Bombay, in *Pranjivandas v. Mayaram*, 1 Bom. H. C., O. C. J., 148, 164 (1863) ; *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 489 (1894) and as to possession in the case of family dwelling-houses in India : *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571, 572, 573 (1871).

² *Ram Chand Dutt v. Watson & Co.*, *supra*, 219, 220.

tice, though the utmost respect should be paid to the wisdom and authority of English Courts, yet Courts in India are by no means bound to adopt all such rules as the Equity Courts in England may have established.¹ Further, as the mode of living in this country is different from that in England,² not only may such mode of life give rise to new rights,³ it may even in the case of such rights as are enforceable in both countries present in particular cases new facts for consideration upon the question of the issue of an Injunction or the assessment of damages.⁴ Thus it has been *held* that, under the circumstances of native society in this country, there may be such a thing as a trespass which works a truly irreparable injury, although it does not effect a lasting alteration of the subject of enjoyment and is such as in England might be capable of being compensated for in pecuniary damages.⁵ Again, English rules and decisions may, in particular cases, be inapplicable owing to the fact that the relations which existed between the Court of Chancery and the Courts of Common Law in England were very different from those between the High Courts and the Mofussil Courts in India, as were also the respective functions and powers of these Courts.⁶ And

¹ *The Oriental Bank Corporation v. Gobindoll Seal*, I. L. R., 10 Cal., 713, 737 (1884), *per* Garth, C. J.

² "The conditions of domestic life in the two countries have from remote times been essentially different, and, in my opinion, it is owing to the difference in the conditions of domestic life alone that a custom which appears to me to be a perfectly reasonable one in India should be unknown in England," *per* Edge, C. J., in *Gokul Prasad v. Radho*, I. L. R., 10 All., 358, 385 (1888), *v. ib.*, 388, *per* Mahmood, J.

³ *E.g.*, the right of privacy: *see* note (3), p. 8, *ante*.

⁴ *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571, 572 (1871).

⁵ *Ib.*, *per* Phear, J.

⁶ *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 358, 359 (1875), *per* Markby, J.: *Dhurnidhur Sen v. Agra Bank*, I. L. R., 4 Cal., 380, 396 (1878); in this country there has been no fusion of jurisdiction, but the Courts are, and have been, both Courts of law and of equity; *see* *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*,

though legislation may give to English Courts powers similar to those possessed by the Courts of this country, their discretionary exercise may here be different owing to circumstances peculiar to the former Courts existing anterior to such legislation.¹ Lastly, where, as in certain instances, English law deals with rights peculiar to itself, their consideration is rendered here unnecessary; where, on the other hand, rights which require protection are peculiar to this country, English rules and decisions will be of service, if at all, only by way of analogy; while as to such as are common to both countries differences both in procedure and substantive law may render these rules and decisions partially or wholly inapplicable.

§ 4. The issue of Injunctions, whether temporary or perpetual, is a form of "specific relief." So also is the appointment of a Receiver pending a suit.² The Code³ further provides for the appointment of a Receiver of property under attachment,⁴ and also in the case of insolvent debtors.⁵ But it has been said that in the former case the appointment of a Receiver is "rather a matter of ministerial procedure than of specific relief;" and in the latter case the Receiver is the agent of the creditors,⁶ and both cases must be distinguished from a Receiver appointed by way of specific relief pending a suit.⁷

The issue of Injunctions is a form of specific relief.

§ 5. The term "specific relief" means more particularly those classes of relief which are defined by,

Meaning of term "specific relief."

I. L. R., 18 Bom., 474, 484 (1894); *Begam v. Muhammad Yakub*, I. L. R., 16 All., 344, 358 (1894).

¹ *Dhunjibhoj Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 261 (1888).

² Act I of 1877, s. 5.

³ S. 503.

⁴ See Form No. 168 in the Fourth Schedule of the Code.

⁵ Ch. XX.

⁶ See *Ex parte Warren*. In re *Joyce*, L. R., 10 Ch. Ap., 222. In the matter of *Badal Singh v. Birch*, I. L. R., 15 Cal., 762, 764 (1888).

⁷ Collett's Law of Specific Relief in India (1882), p. 236.

and granted in civil suits under the provisions of Act I of 1877,¹ but the full significance of which is, however, only to be learnt from the history in England of legal actions and of the interference by Courts of Equity with the limited and imperfect remedial jurisdiction of the Courts of Common Law.² "The remedies for the non-performance of a duty enforceable by law are either compensatory or specific. The compensatory remedy is by the award of damages.³ This remedy is often either useless or inadequate—useless where the person ordered to pay them is insolvent; and inadequate, when, for instance, the duty is to transfer particular immoveable property, or a moveable, to which special interest is attached. The specific remedy is enforced by directing the party in default to do, or forbear, the very thing which he is bound to do or forbear, and in case of disobedience, by imprisonment, or attachment of his property, or both.⁴ When no one is in default, it is enforced by making such declarations and orders as the nature of the case may require."⁵ Courts of Common Law gave specific

¹ The specific reliefs given by this Act are enumerated in its fifth section. Other specific remedies commonly enforced by Indian (as by English) Courts are—(1) taking an account of the property of a deceased person and administering the same (2) taking accounts of a trust and administering the trust-property; (3) the foreclosure of the right to redeem, or the sale of mortgaged property; (4) redemption and reconveyance of mortgaged property; (5) dissolving a partnership, taking the partnership accounts, realizing the assets, compelling each partner to pay the balance due from him, and discharging the debts of the partnership. (See Civil Procedure Code, s. 213, and Schedule VI, Nos. 105—110, 113; Act

II of 1882, s. 59; Act IV of 1882, ss. 60, 67, 85—95; Whitley Stokes *op. cit.*, 928, 929.)

² See Nelson's *Commentaries on the Specific Relief Act* (1894); Introduction, pp. 1—70; where a short historical account is given. See further Spence's *Equitable Jurisdiction of the Court of Chancery*; Snell's *Principles of Equity*; Story's *Equity Jurisprudence*, 2nd English Ed., 1892.

³ The compensatory remedy in matters of contract has been to some extent dealt with by s. 73, Act IX of 1872. The Specific Relief Act deals with it only so far as it is either supplementary or alternative to specific relief.

⁴ Civil Procedure Code, s. 260.

⁵ Whitley Stokes, *op. cit.*, 928.

relief, in the case of immoveable property, in the action of ejectment,¹ and in the actions of detinue² and replevin for the recovery of the specific possession of personal chattels, in neither of which latter actions, however, was there any certainty of recovering aught but damages. With these and some other exceptions the redress given by the latter Courts in all actions, whether founded on contract or tort, sounded in damages only. Equity therefore, where necessary, supplemented the deficiencies of this remedial jurisdiction, by decreeing the restitution *in specie* of specific moveable property, by compelling the performance of contracts and by the administration of both a protective and preventive justice in respect of property, the subject of litigation.³ Thus, for instance, while in effect the common law allowed parties to a contract the election, either to perform or to pay damages for non-performance; equity in cases where there was either no remedy at common law or the remedy was inadequate, deprived the defaulting party of such election.⁴ So also equity devised the remedy by Injunction in some respects analogous to the equitable remedy of specific performance. For while a decree of specific performance, as its name implies, enforces the performance of some specific act, an Injunction which is the very converse, judicially forbids the performance of some specific act or series of acts.⁵

¹ See Act I of 1877, s. 8; the possessory remedy given by s. 9 is taken from s. 15, Act XV of 1859, and resembles the old English assize of "Novel Disseisin."

² See Act I of 1877, s. 10, which embodies, with some change, the common law doctrine of detinue.

³ It is these and other forms of redress, in the main equitable (ss. 8 & 9, 10 are common law remedies, and

ss. 45—51 deal with matters which were the subject of the common law or prerogative writ of *mandamus*) which form the material of Act I of 1877.

⁴ Story's Eq. Jur., § 714: v. 35., note (a) to 13th Amer. Ed., p. 178, and *post*.

⁵ Smith's Principles of Equity (1888), p. 688; as to the form, however, of mandatory injunctions in India, see *post*.

Preventive relief.

§ 6. When specific relief is granted by preventing a party from doing that, which he is under an obligation¹ not to do, it is called "preventive relief,"² and preventive relief is granted at the discretion of the Court by Injunction, temporary or perpetual.³

Relief by Specific Performance, Injunction, and Receiver, belong to the same branch of the law:

§ 7. Relief by specific performance, Injunction and Receiver, belong to the same branch of the law. Moreover the appointment of a Receiver operates as an Injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the Receiver except by permission of the Court;⁴ and "an order for an Injunction is always more or less included in an order for a Receiver. It is not necessary, if a Receiver be appointed, to go on and grant an Injunction in terms."⁵ All three forms of relief are dealt with by the Specific Relief Act. The issue of temporary Injunctions and the appointment of Receivers are, together with the subjects of arrest and attachment before judgment and interlocutory orders, dealt with by the Code under the single heading of "Provisional Remedies."⁶ Relief granted by appointment of a Receiver *pendente lite* bears in many respects a close analogy to that by temporary Injunction. Both are extraordinary equitable remedies as distinguished from the ordinary modes of administering relief. Both are essentially preventive in their nature, being properly used only for the prevention of future injury, rather than for the redress of past grievances. Both have one common object in so far as they seek to preserve the *res* or subject-matter

¹ This term includes every duty enforceable by law. Act I of 1877, s. 3.

² Act I of 1877, s. 6.

³ Act I of 1877, s. 52.

⁴ *Mahommed Zohuruddeen v. Mahommed Noorooddeen*, I. L. R., 21 Cal.,

85, 91 (1893).

⁵ Kerr on Receivers, 3rd Ed. (1891), p. 9. See as to Receivers generally the Author's "Law relating to Receivers in British India."

⁶ Civ. Pr. Code, part IV.

of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the Court.'

§ 8. There is, however, a distinction between the remedies in that "specific performance is directed to compelling performance of an active duty, while Injunction (though sometimes in a subsidiary way requiring an act to be done) is generally directed to preventing the violation of a negative one. This difference, however, is very great. The remedy of specific performance, relating as it does to active duties, deals in the main only with contracts;¹ while the remedy of Injunction, having to do with negative duties, deals not only with contracts, but also with torts, and with many other subjects, among them subjects of a purely equitable nature."² Whether, however, the negative duty, or duty to abstain, be contractual or general, the Injunction which enforces it is the same in nature and form. The general grounds of similarity between relief by Receiver and by Injunction have been adverted to. Perhaps the principal element of difference between these two important remedies lies in this: that an Injunction is strictly a conservative remedy, merely restraining action and preserving matters *in statu quo*, without affecting the possession of the property or fund in controversy; while the appointment of a Receiver is usually a more active remedy, since it changes

but there is a distinction between the remedies.

¹ High on Receivers, 16, 17.

² "From the nature of the case the remedy of specific performance only applies to cases arising out of contract; since it rarely happens apart from contract that one person has a right to the performance of a particular act on the part of another. On the contrary, the cases for which injunction is a proper remedy have usually no connection with contract,

There are, indeed, cases in which one person contracts with another not to do a certain act; and such negative contracts may, as we have seen (p. 656, *Lumley v. Wagner*, 1 DeG. M. & G., 615), be specifically enforced by means of injunction." Smith's Principles of Equity, *supra*, 688.

³ Story, Eq., Jur., 13th Amer. Ed. (1886), p. 179. Note by M. M. Bigelow. Smith's Principles of Equity, 688.

the possession as well as the subsequent control and management of the property. The Court by an Injunction ties up the hands of the defendants, and preserves unchanged, not only the property itself, but the relations of all parties thereto. But in appointing a Receiver the Court goes still farther, since it wrests the possession from the defendant and assumes and maintains the entire management of the property or fund, frequently changing its form, and retaining possession through its officer, the Receiver, until the rights of all parties in interest are satisfactorily determined. From the points of resemblance already indicated it is not to be inferred that the appointment of a Receiver necessarily follows from the granting of an Injunction or that the two remedies are necessarily inseparable. And while it frequently happens that the Courts are called upon to administer both species of relief in the same action, and at one and the same time, yet it by no means follows that because an Injunction is granted a Receiver must be appointed and the two are to be treated as distinct and independent matters. The Court, therefore, may refuse a Receiver, although the case presented is a fitting one for an Injunction, and although an Injunction has already been granted.¹ A distinction exists between the case in which an Injunction and that in which a Receiver will be issued or appointed respectively. "That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation; in the former case, it would be sufficient, if it be shown that the plaintiff in the suit has a fair question to raise as to the existence

¹ High, on Receivers, 17, 18, and see *Hall v. Hall*, 3 Mac. G., 85, where it was said by the Lord Chancellor that "the rights to those different

remedies are essentially distinct and depend upon totally different grounds and circumstances."

of the right alleged; while in the latter case, a good *prima facie*-title has to be made out."¹

§ 9. Relief whether it be given by the issue of an Injunction or the appointment of a Receiver is granted generally upon the principle *quia timet*; that is, the Court assists the party who seeks its aid, because he fears (*quia timet*) some future probable injury to his rights or interests, and not because an injury has already occurred, which requires any compensation or other relief. So the remedy by temporary Injunction being preventive in its nature, it is not necessary that a wrong should have been actually committed before the Court will interfere, since if this were required it would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which the complainant seeks to restrain. And satisfactory proof that the defendants threaten the commission of a wrong (which is within their power) is sufficient ground to justify the relief.² These and other similar precautionary reliefs were formerly granted by Courts of Equity, on Bills *Quia Timet*,³ to support which it must have been shown, firstly, that there was a title in possession or expectancy in the plaintiff, and secondly, that there was danger to the property.⁴ These bills would now take the form of an action in the nature of a Bill *Quia Timet* and would be brought, in England, in the Chancery Division, and in India,⁵ in any Court of jurisdiction

General principle upon which an Injunction is issued or a Receiver appointed.

¹ *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 465 (1895), *per* Ghose and Rampini, JJ., referring to Kerr on Receivers, pp. 3, 4, Kerr on Injunctions, pp. 10, 11.

² Story's Eq. Jur., § 826. High on Injunctions, 17—23.

³ Story Eq. Jur., §§ 825—851. Relief given by way of cancellation of instruments (Act I of 1877, ss. 39—41)

is also given upon the principle *quia timet*. Story's Eq. Jur., § 694.

⁴ *Satoor v. Satoor*, 2 Mad. H. C. R., 810 (1864).

⁵ *v. ib.*, 10, where it was pointed out that the plaint was really in the nature of a Bill *Quia Timet*, but that it did not disclose any of the grounds necessary to support such a bill.

competent to grant the relief prayed. "The remedy of (final) injunction, like that of specific performance, proceeds upon the theory that there are duties the performance of which, as they stand, ought to be insisted upon,—duties in regard to which an election, as an equivalent, to violate the same upon the terms of making compensation cannot be permitted; not indeed that all the duties the violation of which may be enjoined, may be enjoined without regard to the question whether damages for a violation could be accurately computed, but that there *are* duties of a peremptory nature within the operation of the remedy of injunction as well as within that of specific performance. These duties may here, as well as in the law of specific performance, be termed primary, since they are not substitutional."¹

Protective
relief.

§ 10. The manner in which the above-mentioned aid is given by Courts of Equity is, of course, dependent on circumstances. They interfere sometimes by the mere issuing of an Injunction or other remedial process.² But that portion of equitable jurisdiction which consists in the administration of a protective or preventive justice is not limited to this. The Courts interfere also by orders to pay funds into Court,³ by directions to give security, by orders for the detention and preservation of property, by other like orders and directions,⁴ and by the appointment of a Receiver to receive rents or other income,⁵ thus

¹ Story's Eq. Jur., 13th Amer. ed. (1886), pp. 178, 179. Note by M. M. Bigelow.

² *v. supra*.

See *Satoor v. Satoor*, 2 Mad. H. C. R., 8, 11 (1864) ["the protection of property which is the subject of litigation by requiring it to be brought into Court is an important part of its (the Court's) jurisdiction."]

⁴ The Courts in India practically possess all these powers of protective

and preventive relief. See the interlocutory orders in the Civ. Pr. Code, ss. 498—502. Of these, ss. 498—500, 502, were first inserted in the Code of 1877. Section 501 corresponds with s. 91 of the Old Code, Act VIII of 1859. Sections 498—500 are taken from Order 52, Rules 2—4 of the English Judicature Act, and s. 502 from s. 244 of the New York Code.

⁵ Civ. Pr. Code, ss. 503—504; Act I of 1877, s. 44.

adapting their relief to the precise nature of the particular case and the remedial justice required by it; the object being in all cases to preserve property to its appropriate uses and ends.¹

§ 11. The exercise of the jurisdiction to grant relief by the appointment of a Receiver,² or the issue of an Injunction,³ is not a matter *ex debito justitiæ*, but one which is purely within the discretion of the Court. The latter is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.⁴ All questions of discretion are usually questions of degree.⁵ Where there is a discretion exerciseable the Court is bound to look at all the circumstances of the case.⁶ The jurisdiction of the Court to interfere being equitable is governed upon equitable principles. And therefore the Court will, amongst other things, look to the conduct of the person, who makes the application.⁷ Where an appeal attacks the exercise of discretion, before the Appellate Courts will interfere on this ground in favour of the appellant, the

The grant of preventive or protective relief is purely discretionary.

¹ Story's Eq. Jur., § 826; Smith's Principles of Equity, 752.

² Act I of 1877, s. 44.

³ *Ib.*, s. 52.

⁴ *Ib.*, s. 22 (discretion to decree specific performance; See Story's Eq. Jur., § 742); the same rule holds good for injunctions in the case of obligations arising from contract; *ib.*, s. 64: *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 714 (1894), and the principle is of general application in other cases. For "Discretion, when applied to a Court of law, means discretion guided by law. It must be governed by rule and not by humour.

It must not be arbitrary, vague, and fanciful, but legal and regular." Per Lord Mansfield in Wilke's case, 4 Burr., 2539, cited in *Harbans Sahai v. Bhairu Pershad Singh*, I. L. R., 5 Cal., 259, 265 (1879); See also remarks in *Queen-Empress v. Chagan Dayaram*, I. L. R., 14 Bom., 331, 344, 352 (1890), per Jardine, J.

⁵ *Ghanasham Nilkanti Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom. (1894), at p. 493.

⁶ *Ib.*, at p. 484.

⁷ Act I of 1877, s. 56 (j); Kerr on Inj., 15; Kerr on Receivers, 7.

latter must satisfy such Court that the discretion has been improperly exercised.¹

The occasions and principles upon which these discretionary powers will be exercised in the case of Injunctions by Courts in British India form the subject-matter of this branch of the law and of the following chapters.

¹ *Shadi v. Anup Singh*, I. L. R., 12 All., 438 (1889).

CHAPTER I.

INJUNCTIONS GENERALLY.

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| <p>§ 12. MEANING OF TERM "INJUNCTION."</p> <p>§ 13. FORMS OF INJUNCTION:</p> <p style="margin-left: 20px;">(i) Temporary,</p> <p style="margin-left: 20px;">(ii) Perpetual,</p> <p style="margin-left: 20px;">(iii) Mandatory.</p> <p>§ 14. ORIGIN OF THE EQUITABLE RELIEF BY INJUNCTION.</p> <p>§ 15. SUBJECT-MATTER OF INJUNCTIONS.</p> <p>§ 16. CLASSIFICATION OF SUBJECT-MATTER:</p> <p style="margin-left: 20px;">(i) Injunctions in respect of judicial proceedings (actions—execution—wrongful sale in execution),</p> <p style="margin-left: 20px;">(ii) Injunctions in respect of Acts not being judicial proceedings (contract—trust—tort).</p> <p>§ 17. PARTIES—</p> <p style="margin-left: 20px;">(i) In whose favour an Injunction will be granted,</p> <p style="margin-left: 20px;">(ii) Against whom an Injunction may be granted.</p> <p>§ 18. ESSENTIALS TO THE GRANT OF RELIEF BY WAY OF INJUNCTION:</p> <p style="margin-left: 20px;">(i) Relief cannot be granted merely to enforce a penal law,</p> <p style="margin-left: 20px;">(ii) There must be a pending civil action,</p> <p style="margin-left: 20px;">(iii) Cognizance of the action must not be barred,
<i>Maine Moilar v. Islam Amanath.</i></p> <p style="margin-left: 20px;">(iv) The Court must otherwise have jurisdiction to try the suit.</p> | <p>§ 19. EQUITY ACTS IN PERSONAM;
<i>Penn v. Lord Baltimore.</i></p> <p>§ 20. THE APPLICATION OF THIS MAXIM IN INDIA—
<i>Rajmohun Bose v. East Indian Railway Co.</i>
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<i>The East Indian Railway Co. v. The Bengal Coal Co.</i>
<i>Delhi and London Bank v. Wordie.</i></p> <p>§ 22. JURISDICTION TO ISSUE INJUNCTIONS.</p> <p>§ 23. THE EXERCISE OF JURISDICTION IS DISCRETIONARY.</p> <p>§ 24. COURTS BY WHICH AN INJUNCTION MAY BE GRANTED:</p> <p style="margin-left: 20px;">(i) Courts of Original Jurisdiction,
<i>Yamin-ud-Dowlah v. Ahmed Ali Khan.</i>
<i>Gossain Money Purce v. Gour Pershad Singh.</i></p> <p style="margin-left: 20px;">(ii) Courts of Appellate Jurisdiction,</p> <p style="margin-left: 20px;">(iii) Courts of Revisional Jurisdiction.</p> <p>§ 25. ENFORCEMENT OF ORDERS AND DECREES.</p> <p>§ 26. THE EFFECT AND OPERATION OF AN INJUNCTION.</p> <p>§ 27. BREACH OF AN INJUNCTION.</p> <p>§ 28. COMPENSATION TO DEFENDANT FOR THE ISSUE OF AN INJUNCTION ON INSUFFICIENT GROUNDS.</p> |
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Meaning of
term "In-
junction."

§ 12. When Specific Relief is given by preventing a party from doing that which he is under an obligation not to do it is called preventive relief which is granted by means of an Injunction.¹ An Injunction was, under the old English procedure, a writ issuing by order and under seal of the Court of Chancery and was, with certain exceptions, until the Judicature Act of 1873, a remedy peculiar to that Court.² A writ of Injunction³ may be described to be a judicial process whereby a party was required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The process, however, was rather preventive than restorative, though it was by no means confined to the former object. Under the present English procedure no writ of Injunction is to issue. An Injunction is in England,⁴ as in India,⁵ by judgment or order, and such judgment or order has the effect which a writ of Injunction in Chancery previously had.

Forms of In-
junction:

§ 13. Duration, as well as the positive or negative character of their commands, determine the several forms of Injunction which may be either non-mandatory or mandatory, temporary or perpetual.

(1) Temporary. In the first place in respect of duration, Injunctions are, either temporary (or, as they are sometimes called,

¹ Act I of 1877, s. 5.

² Kerr on Injunctions, 3rd ed., 1888, pp. 9, 1; Smith's Chancery Practice, i, 819 (1862); Joyce on Injunctions (1872), p. i. By the Judicature Act all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice, and a somewhat larger jurisdiction to grant injunction was given to the latter by s. 25 (8) than that possessed by the former Court: Kerr, l.

³ As to the form of a Writ of Injunction in Chancery, See Smith's

Chancery Practice, ii, 265, 266. Eden on Injunctions, 367—387.

⁴ Ord. L., r. 11: for some forms in use of the matter of injunctions and restraining orders. See Daniell's Chancery Forms, 4th ed. (1885), 692—698. Civ. Pr. Code, Sched. IV, Forms Nos. 166, 167.

⁵ Civil Procedure Code, ss. 492, 493, 496; Act I of 1877, s. 53. The former deals with the granting of injunctions by order, the latter, with the granting of injunctions by decree at the hearing.

interlocutory) or perpetual. The former are such as are to continue, until a specified time named in the order or until the further order of the Court.¹ They may be granted at any period of a suit and are regulated by the Code of Civil Procedure. The Court may in the case of an Injunction under s. 493 of the Code grant it upon such terms as to the duration of the Injunction as it thinks fit.² The temporary Injunction is merely provisional in its nature and does not conclude a right; its effect and object is merely to preserve the property in dispute *in statu quo*, until the hearing or further order, or to prevent future injury, leaving matters as far as possible *in statu quo*, until the suit in all its bearings can be heard and determined.³ The sole object of an interlocutory Injunction is to preserve the subject in controversy in its then condition, and without determining any questions of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. Only such restraint will therefore be interposed as may suffice to stop the mischief complained of and preserve matters *in statu quo*.⁴ In granting such Injunctions the Courts in no manner anticipate the ultimate determination of the questions of right involved. They merely recognise that a sufficient case has been made out to warrant the preservation of the property or rights in issue *in statu quo*, until a hearing upon the merits, without expressing and indeed without having the means of forming a final opinion as to such rights. The Court upon an application for a temporary Injunction will deal with the

¹ Act I of 1877, s. 53.

² Civ. Pr. Code, s. 493.

³ Kerr on Injunctions, 9-10.
High Inj., 5-6. *Shepherd v. The Trustees of the Port of Bombay*

I. L. R., 1 Bom., 132, 145 (1876), per Green, J.

⁴ *Blakemore v. Glamorganshire, etc.*, 1 Myl. & K., 154, per Lord Brougham. High Inj., 5-6.

application upon the evidence before it and will confine itself strictly to the object sought and as far as possible abstain from prejudging the question in the cause.¹

In order to sustain an Injunction for the protection of property *pendente lite* it is not necessary to decide in favour of the plaintiff upon the merits, nor is it necessary that he should present such a case as will certainly entitle him to a decree upon the final hearing, since he may be entitled to a temporary Injunction, although his right to the relief prayed may ultimately fail.² Nor is the decision of the Court in granting or refusing a preliminary Injunction conclusive upon either the Court or parties on the subsequent disposition of the cause by final decree.³

The Court will not, however, upon an application for such an Injunction shut its eyes to the question of the probability of the plaintiff ultimately establishing his demand and will, before it disturbs a defendant in the exercise of a legal right, consider the probability of the plaintiff maintaining his right against the defendant.⁴

The orders pronounced by English Courts upon applications for temporary Injunctions have varied at different times. Under the former practice, as well as under the Civil Procedure Code,⁵ the form usually adopted was and is "until the hearing of the cause or until further order." Under the present English procedure it is "until judgment in this action or until further order," in order to show that the Injunction is not to extend beyond it,

¹ High Inj., 6; *Gopeenath Moojerjee v. Kally Dass Mullick*, I. L. R., 10 Cal., 225, 231 (1883); *Kerr, Inj.*, 24; *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 466 (1895).

² *Great Western Railway Co. v. Birmingham Ry. Co.*, 2 Ph., 597.

High Inj., 6, citing *Andrae v. Redfield*, 12 Blatch., 407. (Amer.)

³ *Clayton v. Attorney-General*, 1 Coopt. Cottenham, 97; and see *Attorney-General v. Mayor*, 5 DeG. M. & G., 52.

⁵ Civ. Pr. Code, Sched. IV, No. 166; Act I of 1877, s. 53.

unless then continued.¹ For an Injunction, which has been granted upon an interlocutory application, is superseded by the judgment in the action. If it is intended that it should remain in force, it must be expressly continued.²

A temporary Injunction may further come to an end before decree, where an application for its discharge has been made and granted under s. 496 of the Code.

If a suit is decreed, an Injunction granted by the decree will of course subsist pending an appeal against that decree. But, if a suit is dismissed, an interlocutory Injunction previously granted comes to an end.³ The suit ceases to be a pending suit, and the Court which dismissed it ceases to have jurisdiction either to continue and maintain the Injunction so previously granted, or to issue a fresh Injunction in respect of the matter in suit.⁴ If it is desired to obtain a temporary Injunction pending the hearing of an appeal, an application for that purpose should be made to the Appellate Court.⁵

A temporary Injunction may be granted, if in any suit it is proved by affidavit or otherwise (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or (b) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors. In such cases the Court may by order grant a temporary Injunction.

¹ 1 Set., 173; Kerr, 629, 630.

² Kerr, 637.

Kalyanbhai Dipchand v. Ghanasham Lal Jadunathji, 1. L. R., 5 Bom., 29, 31 (1880) and cases cited in the next note.

³ *Yamin-ud-Dowlah v. Ahmad Ali Khan*, 1. L. R., 21 Cal., 561 (1894); *Shaikh Moheesooddeen v. Shaikh Ahmed Hossein*, 14 W. R., 384 (1870); *Gossain Money Puree v. Gour Pershad*

Singh, 1. L. R., 11 Cal., 146 (1884); cf. *Ram Chand v. Pitam Mal*, 1. L. R., 10 All., 506, 512 (1888).

⁵ *Shaikh Moheesooddeen v. Shaikh Ahmed Hossein*, supra., 385; *Gossain Money Puree v. Gour Pershad Singh*, supra. at p. 149; *Kirpa Dayal v. Rani Kishori*, 1. L. R., 10 All., 80 (1887); *Kanahi Ram v. Biddya Ram*, 1. L. R., 1 All., 549, 551, note (1878).

tion to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such Injunction or other order.¹

Further, in any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary Injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The Court may by order grant such Injunction on such terms as to the duration of the Injunction, keeping an account, giving security, or otherwise, as the Court thinks fit or refuse the same.²

(iii) *Perpetual.*

A perpetual Injunction can only be granted by the decree made at the hearing and upon the merits of the suit. It is in effect a decree of the Court. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act which would be contrary to the rights of the plaintiff.³ As is indicated by its name a perpetual Injunction is unlimited in duration. It is in effect a decree and concludes a right and in the matter of procedure is regulated by the law relating to decrees, and in the matter of its grant by the provisions of the Specific Relief Act.

Subject to the other provisions contained in, or referred to by Chapter X of the Specific Relief Act, a perpetual Injunction may be granted to prevent the breach

¹ Civ. Pr. Code, s. 492.

² Civ. Pr. Code, s. 493.

³ Act I of 1877, s. 53.

of an obligation existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract, the Court will be guided by the rules and provisions contained in Chapter II of that Act relating to specific performance. When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property,¹ the Court may grant a perpetual Injunction in the following cases (namely):—(a) where the defendant is trustee of the property for the plaintiff; (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion; (c) where the invasion is such that pecuniary compensation would not afford adequate relief; (d) where it is probable that pecuniary compensation cannot be got for the invasion; (e) where the Injunction is necessary to prevent a multiplicity of judicial proceedings.²

Thus (a) *A* lets certain land to *B*, and *B* contracts not to dig sand or gravel thereout. *A* may sue for an Injunction to restrain *B* from digging in violation of his contract. (b) *A* rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier *B*. The latter may sue for an Injunction restraining *A* from making the noise.³

Injunctions are further distinguishable according as (iii) **Mandatory**, they are framed to prevent or to compel the performance of an act. When an order is framed to compel the performance of a positive act, it is called a mandatory Injunction.⁴ By the Specific Relief Act the Courts are

¹ For the purpose of this section a trade-mark is property. Act I of 1877, s. 54.

² Act I of 1877, s. 54.

³ *Ib.*, illa. (a) and (b). See also the numerous other illustrations appended to s. 54 of the Specific Relief Act.

⁴ See Kerr, 48—51. High Inj., 3.

expressly given power to grant Injunctions to do substantive acts when such Injunctions are necessary to prevent the breach of an obligation. That Act provides that when to prevent the breach of an obligation it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an Injunction to prevent the breach complained of, and also to compel performance of the requisite acts. In England the same thing is partially effected by the indirect method of making orders, called mandatory Injunctions, to refrain from leaving a thing undone.¹

Thus (a) *A*, by new buildings, obstructs light to access and use of which *B* has acquired a right under the Indian Limitation Act, Part IV. *B* may obtain an Injunction not only to restrain *A* from going on with the buildings, but also to pull down so much of them as obstructs *B*'s light. (b) *A* builds a house with eaves projecting over *B*'s land. *B* may sue for an Injunction to pull down so much of the eaves as so project. (c) In the case put as illustration (i) to section 54 of the Specific Relief Act,² the Court may also order all written communications made by *B*, a patient, to *A* as medical adviser, to be destroyed. (d) In the case put as illustration (y) to section 54 of the Specific Relief Act,³ the Court may also order *A*'s letters to be destroyed. (e) *A* threatens to publish

¹ Act I of 1877, s. 55. *Statements of Objects and Reasons*, supra. See *Lane v. Newdigate*, 10 Ves., 192.

² *A* is *B*'s medical adviser. He demands money of *B* which *B* declines to pay. *A* then threatens to make known the effect of *B*'s communications to him as a patient. This is contrary to *A*'s duty, and *B* may sue for an injunction to restrain him from so doing; Act I of 1877, s.

54, ill. (i).

³ *A*, a very eminent man, writes letters on family topics to *B*. After the death of *A* and *B*, *C*, who is *B*'s residuary legatee, proposes to make money by publishing *A*'s letters. *D*, who is *A*'s executor, has a property in the letters and may sue for an injunction to restrain *C* from publishing them. Act I of 1877, s. 54, ill. (y).

statements concerning *B* which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an Injunction to restrain the publication, even though it may be shown not to be injurious to *B*'s property. (*f*) *A* being *B*'s medical adviser, threatens to publish *B*'s written communications with him, showing that *B* has led an immoral life. *B* may obtain an Injunction to restrain the publication. (*g*) In the cases put as illustrations (*v*) and (*w*) to section 54 of the Specific Relief Act¹ and as illustrations (*e*) and (*f*) *ante*, the Court may also order the copies produced by piracy, and the trade marks, statements and communications, therein respectively mentioned, to be given up or destroyed.²

A mandatory Injunction may be either temporary or perpetual. A mandatory Injunction is, however, seldom granted before the hearing though when the case is clear and free from doubt it may be had upon interlocutory application.³ When a mandatory Injunction is asked for, the plaintiff need not apply for an interlocutory Injunction before the hearing.⁴

§ 14. The jurisdiction of equity to decree Injunctions, as well as specific performance, arose, owing to the fact that the Courts of Common Law could afford no remedy

Origin of the equitable relief by Injunction.

¹ *A* pirates *B*'s copyright. *B* may obtain an injunction to restrain the piracy, unless the work, of which copyright is claimed, is libellous or obscene. Act I of 1877, s. 54, ill. (*v*). *A* improperly uses the trade-mark of *B*. *B* may obtain an injunction to restrain the user, provided that *B*'s use of the trade-mark is honest. *Ib.*, ill. (*w*).

² Act I of 1877, s. 55.

³ Kerr, 51; High on Injunctions, 3, Eden's Injunctions, 330, 331; *Gale v. Abbott*, 8 Jur., N. S., 987; *Johnston v. Courts of Justice Chambers*, W. N.

(1883), 5.

⁴ *Ib.*, *Robinson v. Byron* 1 Bro. C. C., 588; *Hervey v. Smith*, 1 K. & J., 392; *Attorney-General v. Metropolitan Board of Works*, 1 H. & M., 312; *Bonner v. Great Western Railway Co.*, 24 Ch. D., 10. The Court will moreover never flinch from ordering work to be undone, if it has been forced on pending an appeal or pending a motion for an Injunction. *Wimbledon Local Board v. Croydon Rural Sanitary Authority*, 32 Ch. D., 428, 429.

⁵ *Gale v. Abbott*, 8 Jur., N. S., 987.

at all or such remedy as they could afford was imperfect or inadequate. The common law Courts had, indeed, in certain cases, the power of prohibiting the committal of wrongs; so waste could be restrained by the writ of prohibition and estrepment of waste. But the cases in which that law supplied remedies of this nature were very few, and the procedure by which they were applied was cumbersome and inconvenient, so that the assistance of equity was at an early period found necessary for the proper administration of justice; and when this jurisdiction was established, the superiority of its process gradually caused the inferior remedies of law to fall into desuetude.¹

Subject-
matter of
Injunctions.

§ 15. An Injunction is a form of relief granted in a pending suit in respect of the actual or threatened infringement or invasion of some *legal right*, that is, some right recognised by and capable of being enforced at law, where under the circumstances of the case and upon the principles which govern the issue of Injunctions, this form of relief is the appropriate remedy for such invasion or infringement. An Injunction will not be granted to parties, who have no legal right whatever. For it is in its nature a just and convenient remedy granted for the purpose of protecting or asserting the legal rights of the parties, that is, for the defence or enforcements of rights which are capable of being enforced at law or in equity.² The granting of Injunctions is not limited to cases in which there is actual or prospective injury to *property*. Thus the publication of a libel,³ the making of slanderous

¹ Story's Eq. Jur., §§ 714, 864; Smith's Principles of Equity, 690. Spence's Equitable Jurisdiction, i, 668. Eden's Injunctions, 159.

² *North London Railway Co. v. Great Northern Railway Co.*, 11 Q.B.D., 38, 39; Kerr Inj., 2-4; and see Snell Eq., 578.

³ Act I of 1877, s. 55, ill. (c); *Quartz Hill, etc., Mining Co. v. Ball*, 20 Ch. D., 501; *Thomas v. Williams*, 14 Ch. D., 864; this was not so either in England prior to the Judicature Act, 1873 (*Prudential Assurance Co. v. Knott*, 10 Ch. 142), or in India prior to the passing of the Specific Relief

statements¹ and injury to personal *status* may be restrained.² But where the subject-matter of an Injunction is property, the latter should, when granted, be strictly confined to the property in suit ;³ as of course in other cases to the restraint of the particular act or acts complained of. Though when a plaintiff alleges and proves a peculiar and specific injury, the order which he obtains gives him an extended right in general terms to restrain any injury of the same kind.⁴ Equity will not interfere for purposes of punishment only nor will it lend its aid by Injunction for the enforcement of right or the prevention of wrong in the abstract, and unconnected with any injury or damage to the person seeking the relief :⁵ nor will the Court interfere by Injunction in matters merely criminal or immoral, which do not affect any right to property ;⁶ nor will the Court interfere in political matters or with the public duties of departments of government or the sovereign acts of foreign governments.⁷

The subject-matter of Injunctions is generally set forth in the Code and Specific Relief Act. The cases in which temporary Injunctions may be granted under the Code are those in which there is danger of waste, damage, alienation or wrongful sale in execution of a decree of property in suit to which the plaintiff has a *primi facie* legal claim, a threatened removal or disposition by a defendant of his own property with intent to defraud and to defeat the rights of his creditors, and a threatened breach

Act, Shepherd v. The Trustees of the Port of Bombay, 1 L. R., 1 Bom., 132 (1876). See *Kerr Inj.*, 2, 502.

¹ *Loog v. Bean*, 26 Ch. D., 306 ; *Hayward v. Hayward*, 34 Ch. D., 204.

² *Aslam v. Mayor, etc., of Southampton*, 16 Ch. D., 148 ; but see also *Milligan v. Sullivan*, 4 Times R., 204.

³ See *post*.

⁴ *Joyce's Doctrines*, 58.

⁵ *High Inj.*, 3.

⁶ *v. post*.

⁷ *v. post*. *Joyce's Doctrines*, 4 ; *Kerr Inj.*, 6 ; as to political matters, see *Emperor of Austria v. Day*, 3 De G. F. & J., 217 ; *United States v. Prieau*, 2 H. & M., 559.

of contract or a threatened committal of some other injury by the defendant to the legal right of the plaintiff. And a perpetual Injunction may be granted, subject to the other provisions contained in, or referred to by, Chapter X of the Specific Relief Act, to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The term "obligation" here includes all such duties, but only such as are enforceable by law. It must therefore be shown, in the first place, that there is a legal right, and that there is an injury either actual or prospective to that right. The subject-matter of the suit must not be illegal. So where more than twenty artisans signed an agreement whereby they constituted themselves an association for a particular purpose, but which association was not registered, it was *held* that the Court could not grant an Injunction to restrain the breach of such agreement.¹

Its classifica-
tion.

§ 16. The occasions upon which the assistance of the Courts by way of Injunction may be invoked in aid of legal rights may be more particularly classified as follows :—Injunctions (A) in respect of judicial proceedings, being either actions, or proceedings in execution of decrees made therein, and either of which may be pending or non-pending at the date of application : (B) in respect of acts not being judicial proceedings, which second division may be sub-divided into Injunctions in the case of obligations arising (i) from contract ; (ii) from trust ; (iii) in tort, such as injuries to the person, to property or to private franchises in the nature of property.

But as the abovementioned matters are those in respect of which an Injunction may generally be granted, so also in the case of each there exists certain statutory

¹ *Bhikaji Subaji v. Bapu Saju*, I. L. R., 1 Bom., 550 (1877).

restrictions withdrawing particular cases from the operation of this form of relief.

An Injunction will be refused (a) on grounds which are based on the *character and conduct of the applicant*, viz., if the applicant have no personal interest in the matter :¹ or his conduct or that of his agents has been such as to disentitle him to the assistance of the Court ;² or if he has acquiesced in the continuing breach complained of ;³ (b) on grounds which are based on a consideration of the *relief applicable*, that is, when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;⁴ and (c) an Injunction will be refused in certain *particular cases*.

Thus an Injunction cannot be granted in respect of class (A)—(1) to stay proceedings in any *criminal* matter ; (2) to stay *civil* proceedings in a Court not subordinate to that from which the Injunction is sought ; (3) to stay a civil judicial proceeding *pending* at the institution of the suit, in which the Injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings.⁵ And an Injunction cannot be granted in respect of class (B), viz. (1) in contract, to prevent the breach of a contract, the performance of which would not be specifically enforced ;⁶ provided that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, does not preclude it from granting an Injunction to perform the negative agreement ; provided further that the applicant has not failed to perform the contract so far

¹ Act I of 1877, s. 56, cl. (k).

² *Ib.*, cl. (j).

³ *Ib.*, cl. (h).

⁴ Act I of 1877, s. 56, cl. (i).

⁵ *Ib.*, cls. (e), (b), (a).

⁶ *Ib.*, cl. (f).

as it is binding on him :¹ (2) in case of tort, to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance.² (3) The Court will not interfere to restrain persons from applying to any legislative body,³ whether of this or of a foreign country. This jurisdiction has been asserted to exist in England, but it is difficult to conceive a case in which such an Injunction would be granted.⁴ (4) Lastly, the Courts will not by Injunction interfere with (i) the public duties of any department of the Government⁵ of India or the Local Government, or (ii) with the sovereign acts⁶ of a Foreign Government.⁷

The limits within which a Court of Equity interferes with the acts of public functionaries or bodies, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, the Court will not interfere. The Court will not interfere to see whether any alteration or regulation, which they may have directed, is good or bad; but if they are departing from that power which the law has vested in them—if they are assuming to themselves a power over property which the law did not give them—the Court no longer considers them as acting under the authority of that law, but treats them, whether they be a corporation or individuals, merely as persons dealing with

¹ Act I of 1877, s. 57.

² *Ib.*, s. 56, cl. (g).

³ *Ib.*, cl. (c).

⁴ Kerr, *Inj.*, 6, 7; Joyce's Doctrines, 23; Joyce's *Inj.*, 804, and cases there cited. In America the jurisdiction is not recognised. *High, Inj.*, 26.

⁵ *Ellis v. Grey*, 6 Sim., 214.

⁶ *Gladstone v. Ottoman Bank*, 1 H. & M., 506; 9 Jur. N. S., 246.

⁷ Act I of 1877, s. 56, cl. (d). See

as to contracts, etc., of foreign Governments; *Smith v. Weyuelin*, L. R., 8 Eq., 198; 17 W. R., 924; *Twycross v. Dreyfus*, 5 Ch. D., 605; *Lariviere v. Morgan*, 7 Ch., 550; *Morgan v. Lariviere*, 7 H. L., 423, 430, and removal of property; *Vavasour v. Kemp*, 9 Ch. D., 351; *Foreign Bondholders v. Pastor*, 23 W. R., 109 (Eng.); Joyce's Doctrines, 37.

property without legal authority,¹ and although the Court will not interfere with any public duty which a public *quasi* corporation aggregate (as for instance, the Lords of the Treasury) have to discharge, or with any discretion which they have to exercise, in their public capacity, yet it will restrain them from doing a mere ministerial act—such as the payment of compensation-money awarded for the abolition of an office, with a view to secure the money for the parties who may be deemed to be entitled to it.² Though no Injunction may thus issue, yet the law has provided in certain cases a remedy for the breach of a public duty. The enforcement of public duty was formerly the object of the common law or prerogative writ of *mandamus*, and though neither the High Court nor any Judge thereof may now issue such a writ,³ yet the Specific Relief Act gives to the Presidency High Courts powers similar to those hitherto exercisable by this writ, enabling them to require specific acts to be done or forborne within the local limits of their ordinary original civil jurisdiction only.⁴

§ 17. The general principles deducible from the author- Parties.
ities as to the joinder of parties complainant and defendant, in Courts of Equity apply to the case of an Injunction Bill, and by these principles the Court is guided in determining whether proper parties have been brought before it for or against whom relief by Injunction is asked.⁵

By the provisions, however, of section 31 of the Civil Procedure Code, no suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights

¹ *Frewen v. Lewis*, 4 My. & Cr., 249,
254; 9 Sim., 66; *Joyce's Doctrines*
24, 25; *Kerr, Inj.*, 568.

² *Ellis v. Grey*, 6 Sim., 214; See

Joyce's Doctrines, 299, 301.

³ Act I of 1877, s. 50.

⁴ *Ib.*, ss. 45—51.

⁵ *High, Inj.*, s. 1547.

(f) In whose favour an Injunction will be granted.

and interests of the parties actually before it. An Injunction will only be issued in favour of the person or persons, whose legal right has been infringed. An Injunction cannot be granted, if the applicant have no personal interest in the matter even though he may have been made a party to the action.¹ The jurisdiction will be exercised only on behalf of parties having a legal right, and interested in the transaction or subject-matter of the proceedings which it is sought to enjoin. Nor will the Court interpose by Injunction for the protection of one who seeks relief indirectly through the equities of other parties on which they themselves do not insist.² The simplest and most generally accepted test in determining whether a person is a proper party plaintiff to an action for an Injunction is whether he possesses a legal or equitable interest in the subject-matter of the controversy.³ This legal right may be inherent either in some particular individual alone, or it may be common to an individual, along with a number of other persons, whose interest is identical in a juridical point of view; or the act complained of may affect the public at large. In the first case, the individual whose right is infringed alone can sue. Where there are several persons in whom the right to relief claimed is alleged to exist jointly, severally, or in the alternative in respect of the same cause of action, they may all be joined as plaintiffs.⁴ Where there are numerous parties, that is to say, parties capable of being ascertained,⁵ having the same interest in one suit, one or more of such parties

¹ Act I of 1877, s. 56, cl. (k); *Wynne v. Newborough*, 1 Ves., 164; *Hunter v. Nockolds*, 15 L. J., Ch., 320; *Leake v. Beckett*, 1 Y. & J., 339.

² *Roberts v. Boson*, 3 L. J., Ch., 113, as to relief in favour of defendant in suit by plaintiff for partition, see

Durga Nath Pramanik v. Ohintamont Dasol, I. L. R., 31 Cal., 214, 221 (1903).

³ High, Inj., s. 1556.

⁴ Civ. Pr. Code, s. 26.

⁵ *Sajedur Raja v. Baidyanath Deb*, I. L. R., 20 Cal., 397 (1892).

may, with the permission of the Court, sue or be sued, or may defend, in such suit on behalf of all parties so interested.¹ Section 30 of the Civil Procedure Code is designed to allow one or more persons to represent a class having special interests rather than to allow such persons to sue on behalf of the general public.² In England and America when the right involved is purely of a public nature, and the grievance, which it is sought to enjoin, is one which affects the public at large, proceedings are usually instituted by the Attorney-General on behalf of the Crown or People. This is commonly done in the case of public nuisances.³ In this country, where no such, or other official with similar powers, exists, an action would be maintainable at the instance of those municipal or other bodies, which have control in respect of the particular subject-matter in question.⁴ Section 539 of the Civil Procedure Code, however, permits, in the case of suits relating to public charities, either the Advocate-General or two or more persons having an interest in the trust to sue to enforce the interests of the public at large in the subject-matter of the suit.⁵ When relief by Injunction is sought for the protection of the rights of churches, religious bodies and the like, the action is usually brought in the name of the trustees.⁶

¹ Civ. Pr. Code, s. 30: See as to suits for an Injunction, *Kalidas Jivram v. Gor Parjaram Hirji*, I. L. R., 15 Bom., 309 (1890); *Anandray Bhikaji v. Shankar Daji Charya*, I. L. R., 7 Bom., 324 (1883); *Moxley v. Alston*, 1 Ph., 790; *Navroji Manekji Wadia v. Dastur Kharsidji Mancherji*, I. L. R., 28 Bom., 20 (1903).

² *Adamson v. Arumugam*, I. L. R., 9 Mad., 463 (1886).

³ *Kerr, Inj.*, 22; *High, Inj.*, s. 1554.

⁴ So in America it has been held

that the corporate authorities of a town are proper parties to enjoin a public nuisance; *High, Inj.*, s. 1555. And see also *The Mayor of London v. Bolt*, 5 Ves., 129.

⁵ As to private trusts, see *Brojohomun Doss v. Hurrooll Doss*, I. L. R., 5 Cal., 700 (1880).

⁶ See *Augustine v. Medlycott*, I. L. R., 15 Mad., 241 (1892); for a suit by a temple committee. See *Ponduranga v. Nagappa*, I. L. R., 12 Mad., 366 (1889).

(46) Against whom an Injunction may be granted.

The person against whom an Injunction is sought must not only be a person against whom the claim of the plaintiff is in fact rightly laid in respect of the act complained of, but also a person within the reach of the Court or amenable to its jurisdiction and bearing such a character, as shall render him personally so amenable.¹ An Injunction will not in general be granted against any one who is not a party to the action.² The cases cited as exceptions to, hardly infringe upon, this general rule. Thus the attorneys, agents, servants and workmen of the party, enjoined may also be enjoined, although the plaint and notice of motion may only ask for an Injunction against the defendant.³ But in such a case the acts of the agents and servants are, in law, the acts of the defendant himself. Again, the purchaser under a decree will be restrained from acting contrary thereto, although not a party to the action :⁴ for the purchaser by his act of purchase submits himself to the jurisdiction of the Court as to all matters connected with that character. So also it has been held that a tenant holding under a Receiver will be restrained on motion, though not a party to the action.⁵ For as the tenant has entered into an agreement with the Court itself by means of the Receiver, it is not necessary that an action should be filed against him.

In so far as an Injunction is in its nature a remedy against an individual, it will be issued only in respect of acts done by him against whom it is sought to be enforced.

¹ *v. post* ; as to the persons who may be joined as defendants. See Civ. Pr. Code, ss. 28, 29, 30.

² *Eden, Inj.*, 320 ; *Drewry, Inj.*, 346, 369, 370 ; *Kerr, Inj.*, 613 ; *Joyce's Inj.*, 1259 ; *High, Inj.*, s. 1548 ; *Iveson v. Harris*, 7 Ves., 256 ; *Brown v. Frost*, Sug. V. & P., 229n ; *Dawson v. Princeps*, 2 Anst., 521.

³ *Humphreys v. Roberts*, 1 Set., 173 ; *Kerr, Inj.*, 613 ; but the Injunction will not be extended to his tenants ; *Hodson v. Coppard*, 29 Beav., 4.

⁴ *Casamajor v. Strobe*, 1 Sim. & St., 381.

⁵ *Wallon v. Johnson*, 15 Sim., 352.

Thus an Injunction cannot be obtained against executors on account of acts done by their testator. They may be sued for an Injunction in respect of a wrong done by themselves, but they cannot be so sued in a representative character.¹ And for the same reason, namely, that an Injunction is an order directed to a person, it does not run with the land.² By reason of this same operation *in personam*, the Court may exercise jurisdiction quite independently of the act to be done, provided the defendant be within the reach and amenable to the process of the Court.³ An action may be brought to restrain a party, who claims a right to do a thing, even though he says he has no present intention to do it.⁴ And the parting by a defendant with his interest after the bringing of the action does not disentitle the plaintiff to an Injunction.⁵ But a man who has assigned or disposed of his interest in the subject-matter should not be made a party to the action.⁶ No suit, however, shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it.⁷ When there is a case for an Injunction, and the Injunction will operate for the benefit of parties not before the Court the absence of those parties will not prevent the Court from interfering. It is enough that the property sought to be protected is really in danger.⁸ In cases of Injunction the Court

¹ *Kirk v. Todd*, 21 Ch. D., 487.

² *Att.-Gen. v. Birmingham, etc., Drainage Board*, 50 L. J., Ch., 786, W. N. (1881), 83.

³ *v. post.*

⁴ *Hest v. Gill*, 7 Ch. App., 609; *Shafto v. Bolckow & Co.*, 35 W. R. (Eng.), 562.

⁵ *Bird v. Lake*, 1 H. & M., 121.

⁶ *Hawkins v. Gardiner*, 1 W. R. (Eng.), 345; *Clements v. Welles*, 1 Eq., 200; cf. *Evans v. Davies*, 10 Ch. D., 747.

⁷ Civ. Pr. Code, s. 31; and as to the dismissal or addition of parties *v. ib.*, s. 32.

⁸ *Const v. Harris*, T. & R., 514; *Evans v. Coventry*, 5 D. M. & G., 911; *Hamp v. Robinson*, 3 D. J. & S., 109.

frequently acts for parties in their absence.¹ But where the Injunction would have the effect of injuring materially the rights of those persons who are not before the Court, the latter will not ordinarily and without special necessity interfere.² An Injunction directed to a Corporation or public company is binding not only on the Corporation or company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.³ A Municipal Corporation as such cannot be held guilty of contempt in violating an Injunction, but only the persons or officers who have disobeyed the writ.⁴

Essentials to the grant of relief by way of Injunction.

§ 18. The jurisdiction of the Civil Courts in this country to grant relief by Injunction is given by the Specific Relief Act⁵ (I of 1877), and the jurisdiction to appoint Receivers by the Civil Procedure Code.⁶ Certain common conditions are necessary to the existence of jurisdiction to grant either of these forms of relief.

(6) Relief cannot be granted merely to enforce a penal law.

In the first place, specific relief, whether given by the issue of an Injunction or the appointment of a Receiver, cannot be granted for the mere purpose of enforcing a penal law⁷—that is, such enforcement must not be the *sole* object of requiring specific relief, but the real object must be the protection of some civil right or the prevention of a tort or civil wrong. Nor can an Injunction be granted to stay proceedings in any criminal

¹ *Conal v. Harris*, supra; *Evans v. Coventry*, supra.

² *Hartlepool Gas & Water Co. v. West Hartlepool Harbour and Railway Co.*, 12 L. T. N. S., 366; See *M'Beath v. Ravenscroft*, 8 L. J., Ch. N. S., 208; Kerr on Injunctions, 23.

³ Civ. Pr. Code, s. 495.

⁴ *Bass v. City of Shakopee*, 27 Minn., 260 (Amer.).

⁵ *Ghanasham Nilkant Nadkarni*

v. Moroba Ramchandra Pai, I. L. R., 18 Bom., 474, 484 (1894); Act I of 1877, s. 52; See also Civ. Pr. Code, ss. 492—497.

⁶ Civ. Pr. Code, ss. 503—505; See also Act I of 1877, s. 44. In order to save repetition the essentials of jurisdiction in the case of Receivers is also here dealt with.

⁷ Act I of 1877, s. 7; Kerr on Injunctions, 5.

matter.¹ "The Court has no jurisdiction to restrain or prevent crime, or to enforce the performance of a moral duty, except so far as the same is concerned with rights to property; nor can it interfere on the ground of any criminal offence committed or for the purpose of giving a better remedy in the case of a criminal offence.² But if an act, which is criminal, touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property."³ All prosecutors, whose charges are dismissed by the Presidency Magistrate, being affected by the order of discharge, have been *held* to be entitled⁴ to copies of the order made, and of the depositions taken before the Magistrate, and an application to compel the Magistrate to grant such copies is not an application "for the mere purpose of enforcing a penal law." Copies may be required for many purposes.⁵ So also, if an act complained of touches the enjoyment of property the fact that it amounts to the criminal offence of misappropriation rather than to simple waste, is no ground for refusing relief by way of appointment of a Receiver.⁶

Assuming the matter to be of a civil nature, it is a necessary condition to the existence of jurisdiction to

(ii) There must be a pending civil action.

¹ Act I of 1877, s. 56 (e); *Holden v. Saunders*, 6 Mod., 12; *Montague v. Dudon*, 2 Ves., 396. See the older cases collected in Eden, *inj.*, 41, 42.

² *Att-Gen. v. Sheffield Gas Co.*, 3 D. M. & G., 320; *Kerr v. Mayor, etc., of Preston*, 6 Ch. D., 463; *Emperor of Austria v. Day*, 3 D. F. & G., 253; *Saull v. Browne*, L. R., 10 Ch., 64. ³ *Kerr*, 5; Act I of 1877, s. 7; *Macaulay v. Shakell*, 1 Bligh. N. S., 127; *Mogul Steamship Co. v. Mac-*

gregor, 15 Q. B. D., 476; *Att-Gen. v. Sheffield Gas Co.*, *supra*; *Emperor of Austria v. Day*, *supra*.

⁴ Under s. 170 of the *Presidency Magistrates' Act*: See now *Criminal Procedure Code*, s. 548.

⁵ In the matter of *The Empress* on the prosecution of *The Bank of Bengal v. Dinonath Roy*, I. L. R., 8 Cal., 166, 168 (1881).

⁶ *Hanumayya v. Venkatesubayya*, I. L. R., 18 Mad., 23 (1894).

grant relief, whether by the issue of an Injunction¹ or the appointment of a Receiver,² that there should be a suit pending in which either of these reliefs may be granted.³ So according to equity practice neither a common nor special Injunction could in general be obtained except on bill previously filed.⁴ And the suit must be pending in the Court from which either of these reliefs is sought.⁵ Thus a District Court has no jurisdiction to issue an Injunction or to appoint a Receiver or Manager in respect of property in dispute in a suit pending in a subordinate Court;⁶ and where a Court has thus no jurisdiction to make an order it can have no jurisdiction to modify such order.⁷ Perhaps in an urgent case an interim Injunction will be granted before plaint filed upon the applicant undertaking to file a plaint at once.⁸ But the grant in such a case is a matter of indulgence, and the undertaking prevents it from being a real exception to the general rule. In a matter already pending before the Court and in which plaintiff may obtain full relief by motion a Court of Equity will not ordinarily entertain a new and independent action for an Injunction. When the Court is already in possession of a cause having jurisdiction both of the subject-matter in controversy and of the parties, it may enforce obedience to its mandates by an Injunction issued merely upon a petition in the cause

¹ Civ. Pr. Code, ss. 492, 493; Act I of 1877, s. 53.

² Civ. Pr. Code, s. 503; Act I of 1877, s. 44; Kerr on Receivers, 111; Bennet's Receivers, 3; Ex parte Mountford, 15 Ves., 445, 447; Butler v. Freeman, Amb., 303.

³ The terms of the sections of the Code and Specific Relief Act cited in the last two notes assume the existence of a pending suit.

⁴ Eden, Inj., 45—48, 320; Drewry,

Inj., 346, 360—362, 364. Nor has a Court jurisdiction to appoint a Receiver unless a cause be depending; Ex parte Whitfield, 2 Atk., 315; Bennet's Receivers, 3.

⁵ Dhundiram Santukram v. Chanda Nabai, 2 Bom. H. C. R., 103, 2nd Ed., 98 (1865).

⁶ *Ib.*

⁷ *Ib.*

⁸ v. post.

and without the filing of a suit.¹ So in a suit for partition by a Hindu widow where it was contended by the defendant that there was likelihood of waste it was held that a multiplicity of suits being undesirable there was nothing to prevent relief being given to the defendant by Injunction without a fresh suit.² But when a decree has been made and fully carried out in a cause, the cause is out of Court, and a motion for an Injunction cannot be made in that cause, although there may be ample ground for sustaining it in a new cause.³

Not only must the matter be of a civil, as opposed to a criminal, nature, and a suit be pending, but such suit must disclose a cause of action, and the Court must have general jurisdiction to entertain it; if it has not such jurisdiction it will plainly have no power to grant relief in respect of the subject-matter of such suit by way of Injunction or appointment of Receiver. The Court must not be barred by the Code or any other enactment from taking cognisance of the suit,⁴ which must, further, be not only of a civil nature generally, but within the meaning of that Code.⁵ Thus where certain Moplahs, described as “the *Moktessar* and *Jamats*” of a mosque sued certain other Muhammadans, described as “members of the Puslar caste,” alleging that the custom was for the defendants to attend the plaintiffs’ mosque on Friday at the reading of the *kutbah*, and that the defendants had recently built another mosque a short distance off, and had “for two months been attempting to read

(44) Cognisance of the action must not be barred.

Maine Mollar v. Islam Amanath.

¹ *Faison v. McIlwaine*, 72 N. C., 312 (Amer.); In the matter of *Hemint*, 2 Paige, 316 (Amer.) cited in High, Inj., § 1566, and see cases cited in Joyce, Inj., 1259.

² *Durga Nath Pramanik v. Chintamani Dossee*, I. L. R., 31 Cal., 214, 221

(1903).

³ *Ford v. Compton*, 1 Cox, 296; *Drewry*, Inj., 380.

⁴ Civ. Pr. Code, s. 11.

⁵ *Ib.* See cases cited in O’Kinealy’s Civil Procedure Code, 4th Ed. (1893), pp. 15—28.

the *kutbah* there ;” and further alleging in the plaint that such reading of the *kutbah* was “quite contrary to the Muhammadan religion,” and that the defendants nevertheless proposed to have the *kutbah* read, “whereby the *kutbah* or adoration conducted in our mosque will, according to religion, be fruitless ;” and the prayer of the plaint was for an Injunction, restraining the defendants from reading the *kutbah* in their mosque ; it was held that, as it was not the province of the Courts to determine what is, or what is not, contrary to the Muhammadan religion, or to decide what religious service different sects of a community may hold in their own places of worship, provided the holding of such services cause no disturbance or illegal annoyance to the rest of the community, or does not infringe on the rights of their co-worshippers,¹ the plaint disclosed no cause of action. The Injunction was therefore refused and the suit dismissed.² But a suit, in which the right to property or to an office is contested, is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rights or ceremonies.³ Nor must the claim be affected by the rule, which relates to pending suits,⁴ or the rule which prohibits the determination of an action by reason of its being *res judicata*.⁵

(iv) The Court must otherwise have jurisdiction to try the suit.

Lastly, the Court, to which application for the relief prayed for is made, must be one which, assuming all the

¹ See *Fazl Karim v. Maula Baksh*, I. L. R., 18 Cal., 448 (1891), where an injunction was granted restraining defendants from interrupting religious ceremonies in a masjid.

² *Maine Moilar v. Islam Amanath*, I. L. R., 15 Mad., 355, 356 (1891).

³ Civ. Pr. Code, s. 11, *Explanation* ; as to the right to an office, see *Srini-*

vasa v. Tiruvengada, I. L. R., 11 Mad., 450 (1888), where an injunction was granted ; and *Raja Valad Shivaga v. Krishnabhat*, I. L. R., 3 Bom., 232 (1879) ; where an injunction was refused, but damages were given against the defendant.

⁴ Civ. Pr. Code, s. 12.

⁵ *Ib.*, ss. 13, 14.

preceding conditions to have been fulfilled, has otherwise jurisdiction to try the suit in which that relief is sought. In this country the extensive powers of the Court of Chancery to act *in personam* must be considered with reference to the limitations on jurisdiction imposed by the Charters and by the Code of Civil Procedure.

§ 19. It is a well-known maxim that "equity acts *in personam*," that is, it regards its decrees as commands or directions—positive, as in the case of specific performance, or negative, as in the case of Injunctions—addressed to the defendant personally, rather than as decisions directly affecting the subject-matter of dispute. Of this maxim the leading case of *Penn v. Lord Baltimore*¹ affords the chief illustration.² In this case, which was a suit regarding land in the United States (that is, beyond the jurisdiction of the English Court of Chancery), Lord Chancellor Hardwicke stated, in effect, as follows: "The strict primary decree in this Court, as a Court of Equity, is *in personam*,"³ and although this Court cannot (in the case of lands situate without the jurisdiction of the Court) issue execution *in rem*—e.g., by elegit—still I can enforce the judgment of the Court, which is *in personam*, by process *in personam*: e.g., by attachment⁴ of the person when the person is within the

"Equity acts
in personam."

*Penn v. Lord
Baltimore.*

¹ 1 Ves., 444; 2 White & Tudor L. C., 837, 5th Ed. The bill in this case sought specific performance of an agreement entered into between the plaintiffs and the defendant for settling the boundaries of land in America (then a British colony) by drawing lines in a particular manner specified.

² See Snell's Principles of Equity, 11th Ed. (1894), 42, 43; Smith's Principles of Equity, 2nd Ed. (1888), 16—18; *Ewing v. Orr Ewing*, L. R., 9 Ap. Cas., 34, 40; *H. H. Shrimant*

Maharaj Vashwantrav Holkar v. Dadasai Owaraji Ashburner, L. L. R., 14 Bom., 353, 359 (1890).

³ And so the Court refused to decree quiet enjoyment of the lands, application for that purpose being proper only to Courts having jurisdiction over the land itself: See *Jatram Narayan Raje v. Atmaram Narayan Raje*, L. L. R., 4 Bom., 482, 486, 487 (1890).

⁴ This power has been termed the keystone of the equitable jurisdiction. The High Courts in India have all the powers of a Court of Equity in Eng-

jurisdiction or by sequestration of the goods or lands of the defendant when these are within the jurisdiction of the Court, until the defendant do comply with the order or judgment of the Court, *which is against himself the defendant personally, to do or cause to be done or to abstain from doing some act.*"

The Court may thus exercise jurisdiction quite independently of the locality of the act to be done, provided the person against whom relief is sought by way of Injunction or otherwise is within the reach and amenable to the process of the Court. In the exercise of such powers the Court does not lay claim to the exercise of judicial and administrative rights in localities beyond its jurisdiction, but proceeds solely on the circumstance of the person, to whom the order is addressed, being within the reach of the Court. And not only must such person be within the reach of the Court as to locality, but he must bear such a character as shall render him personally amenable to its jurisdiction.¹

In accordance with the principle laid down in *Penn v Lord Baltimore*, the Court of Chancery has entertained actions for accounts and discovery of rents and profits; for specific performance and Injunction;² for foreclosure of mortgages;³ and for the execution of conveyances and

land for enforcing their decrees in personam; see *H. H. Holkar v. Dadabhai*, supra, 359, and *post*.

¹ Kerr, Injunctions, 6, and cases there cited. *Rajmohun Bose v. East Indian Railway Co.*, 10 B. L. R., 241, 248 (1872); *Dhuronidhur Sen v. The Agra Bank*, I. L. R., 5 Cal. (1879) at p. 96.

² *Ex parte Pollard*, 1 Mont. & Ch., 239; *Mercantile Investment Co. v. River Plate Co.*, 1892, 2 Ch., 303; Kerr on Injunctions, p. 6, and cases

there cited; as to Injunctions *v. post*: and as to the specific performance of contracts relating to land in India. See *Ramdhane Shaw v. S. M. Nobumoney Dossce*, Bourke, 218 (1865); *Kellie v. Fraser*, I. L. R., 2 Cal. at p. 463 (1877); *Sreenath Roy v. Cally Doss Ghose*, I. L. R., 5 Cal., 82 (1879); *H. H. Holkar v. Dadabhai*, I. L. R., 14 Bom., 353 (1890), and *post*.

³ *Paget v. Ede*, L. R., 18 Eq., 118 [See as to this case *The East Indian Railway Co. v. The Bengal Coal Co.*,

the like regarding lands situate abroad and whether within the Queen's dominions or not.¹ But if the very title itself to the lands is in question,² the Court will not assert its jurisdiction, for that is a question exclusively appropriate for the law of the country in which the property is situated. Moreover, when the lands in question are out of the jurisdiction no decree will be pronounced which purports *directly* to affect them.³ Thus a partition of land in Ireland will not be decreed in England, simply because no power could be given to Commissioners to go there and take the steps necessary for carrying out the decree.⁴

This, however, is totally distinct from such a case, as *Penn v. Lord Baltimore*, in which the decree (although its ultimate practical effect would no doubt be the settlement of boundaries out of the jurisdiction) dealt expressly with the agreement of the parties, and was directed immediately *in personam*.⁵

§ 20. The Courts of this country have ordinarily no jurisdiction to try suits for immoveable property, where such property is situate without the local limits of their jurisdiction;⁶ and it would appear to be doubtful whether

The application of this maxim in India;

1 L. R., 1 Cal., 95, 100 (1875); *H. H. Holkar v. Dadabhai*, L. R., 14 Bom., 359 (1890) and *post*; *Toller v. Carteret*, 2 Vern., 494; *Colyer v. Finch*, 5 H. L. Ca., 905.

¹ See Snell's Principles of Equity, 43; Smith's Principles of Equity, 16—18; *H. H. Holkar v. Dadabhai*, *supra*, 359.

² *DeSouza v. British South African Co.*, 1892, 2 Q. B., 358; *In re Hawthorne, Graham v. Massey*, 23 Ch. D., 743.

³ See *Yenkoba Balshet Kasar v. Rambhaji*, 9 Bom. H. C. R., 13 (1872).

⁴ *Carteret v. Pettus*, 2 Ch. Ca., 214;

² *Swanst.*, 323 n; followed in *Ramchandra Dada Naik v. Dada Mahadev Naik*, 1 Bom. H. C. R., App. 76, 83 (1861); *Jairam Narayan Raje v. Atmaram Narayan Raje*, L. L. R., 4 Bom., 482, 486 (1880), referred to in *The Delhi & London Bank v. Wordie*, L. L. R., 1 Cal. at p. 256 (1876). S. C. 25 W. R., 272. See also *Sm. Padamani Dasi v. Sm. Jagadamba Dasi*, 6 B. L. R., 134 (1870).

⁵ Smith's Principles of Equity, 17, 18.

⁶ Letters Patent, 1865 (Calcutta), cl. 12, Civ. Pr. Code, ss. 16, 16a, 19. As to the charters of the other High Courts, *v. ante*, p. 4, note (6).

the equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely, to take cognisance of any equity between persons residing within the jurisdiction respecting lands outside it.¹ Thus the decisions are conflicting upon the point whether such Courts are empowered to entertain suits for foreclosure, or sale, or redemption of property beyond their local jurisdiction,² or for specific performance of contracts relating to land similarly situated.³ Moreover, the present tendency even in the case of English Courts is to abstain from interfering *in personam* where the matter concerns land outside their jurisdiction.⁴ The jurisdiction of the Courts

¹ See *per Sargent, C. J.*, in *H. H. Holkar v. Dadabhai*, 1 L. R., 14 Bom., 353, 359 (1890).

² According to the decisions of the Calcutta High Court, it seems to be settled law that that Court has not jurisdiction in such cases; *The East Indian Railway Co. v. The Bengal Coal Co.*, 1 L. R., 1 Cal., 96, 100 (1875). ["The express words of cl. 12 of the Letters Patent render the principles of the decision in *Paget v. Eds* (L. R., 18 Eq., 118) inapplicable," *per Phear, J.*]; See *Juggodumba Dossee v. Puddomoney Dossee*, 15 B. L. R., 328, 329 (1875); *Bibes Jans v. Meerns Mahomed Hadee*, 1 Ind. Jur. N. S., 40 (1866); *Sm. Lalmoney Dassi v. Juddonauth Shaw*, 1 Ind. Jur. N. S., 319 (1866); *Blacquiens v. Ramdhone Doss*, Bourke, O. O., 319 (1865). In the matter of the petition of *S. J. Leslie*, 9 B. L. R., 171; 18 W. R., 269 (1872); *Kansi Chunder Pal Chowdhry v. Kisorey Mohun Roy*, 1 L. R., 19 Cal., 364 note (1887); See, however, observations of Garth, C. J., in *The Delhi and London Bank v. Wordie*, 1 L. R., 1 Cal. at pp. 257, 263 (1876); but it is otherwise in Bom-

bay; *H. H. Holkar v. Dadabhai*, 1 L. R., 14 Bom., 353 (1890); though as to the powers of the Mofussil Courts in that Presidency, see as to the former law, *Venkoba Balshet Kasar v. Rambhaji*, 9 Bom. H. C. R., 12 (1872), and as to the present, *Vithalrao v. Vaghaji*, 1 L. R., 17 Bom., 570 (1892).

³ In *Ramdhone Shaw v. Sm. Nobumoney Dossee*, Bourke, 218 (1865) [See as to this case *The Delhi & London Bank v. Wordie*, 1 L. R., 1 Cal. at p. 256; *Kellie v. Fraser*, 1 L. R., 2 Cal. at p. 453; and *Juggodumba Dossee v. Puddomoney Dossee*, 15 B. L. R., 329; *Land Mortgage Bank v. Sudurudeen Ahmed*, 366, *post*], and *H. H. Holkar v. Dadabhai*, 1 L. R., 14 Bom., 353 (1890), the Court was held to have, and in *Sreenath Roy v. Cally Doss Ghose*, 1 L. R., 5 Cal., 82 (1879), not to have jurisdiction. In *Land Mortgage Bank v. Sudurudeen Ahmed*, 1 L. R., 19 Cal., 368, 366 [1892], it was suggested that there is a distinction between a vendor's suit and a purchaser's suit for specific performance; *id.* at p. 366.

⁴ *Land Mortgage Bank v. Sudurudeen Ahmed*, *supra* at p. 367, *per*

governed by the Code appears to be certainly of a more limited extent than that possessed by the Court of Chancery. For not only are they expressly deprived of power to entertain suits for foreclosure or redemption,¹ but the other limitations imposed on their jurisdiction to try suits relating to immoveable property are in terms extensive,² and the proviso determining their powers to act *in personam* limits the exercise of such powers to cases where the property is held by, or on behalf of, the defendants,³ when the relief sought can be entirely obtained through his personal obedience, and where the property is situated in British India.⁴

But whatever may be the precise extent of this general equitable jurisdiction, the Civil Procedure Code has expressly given to the Mofussil Courts the power to act *in personam*, when the person against whom relief is sought resides within the jurisdiction. So suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant⁵ may, when the relief sought can be entirely obtained through his personal obedience,⁶ be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries

Trevelyan, J.; See *DeSouza v. British South African Company*, 8 Times L. R., 369; 2 Q. B. (1892), 358.

¹ Civ. Pr. Code, s. 16 (c).

² *v. ib.* (d).

³ See *Crisp v. Watson*, I. L. R., 20 Cal., 689 (1893); *v. post*, note (5).

⁴ Civ. Pr. Code, s. 16, See Explanation to section.

⁵ See *Crisp v. Watson*, I. L. R., 20 Cal., 689 (1893) [suit to recover damages for trespass to land and for an

injunction] in which the proviso to s. 16 was held to be inapplicable as the land was in the plaintiff's possession; and in which it was also held that a suit for damage to land cannot be said to be a suit for which relief can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction.

⁶ See *Vithalrao v. Vaghaji*, I. L. R., 17 Bom., 570, 572 (1892).

on business, or personally works for gain.¹ "Property" in this section means property situated in British India.² The Presidency High Courts under their charters have a similar, but in terms less restricted, jurisdiction.³

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Thus where the plaintiffs, the owners and occupiers of a house and premises in Howrah, sued in the High Court at Calcutta for an Injunction to restrain a nuisance caused by certain workshops, forges and furnaces erected by the defendants, and for damages for the injury done thereby, it was held that as regards jurisdiction, the defendant company being undoubtedly personally subject to the jurisdiction by reason of their carrying on business in Calcutta, the Court could properly deal with the suit, which was not a suit "for land,"⁴ but one exclusively *in personam*, where the person against whom relief was sought was within, and subject to, the jurisdiction, though the relief sought was in respect of acts done on land situated beyond the local limits of the original jurisdiction.⁵

*Juggodumba
Dosses v. Puddomoney
Dosses.*

And in the case of Receivers it is not necessary in all cases, in order to authorize the Court to appoint a Receiver, that the property in respect of which he is to be appointed should be within the local limits of its jurisdiction.⁶ Thus in a suit brought by some of the persons

¹ Civ. Pr. Code, s. 16.

² *Ib.*; *Vithalrao v. Vaghaji*, supra, 572.

³ Letters Patent, 1865 (Calcutta), s. 19; Letters Patent, 1862, cl. 18; 24 and 25 Vic., cap. 104, s. 9. As to the equitable jurisdiction of the High Courts inherited from the late Supreme Courts, *v. ante*, p. 5, note (3). See *H. H. Holkar v. Dadabhai*, I. L. R., 14 Bom., 353 (1890).

⁴ *ie.*, within the meaning of s. 12 of the Letters Patent, 1865, or s. 5 of Act VIII of 1869.

⁵ *Rajmohan Bose v. East Indian*

Railway Co., 10 B. L. R., 241, 248 (1872). See also *The East Indian Railway Co. v. The Bengal Coal Co.*, I. L. R., 1 Cal., 95, 100 (1875); *The Delhi and London Bank v. Wordie*, I. L. R., 1 Cal., 249, 251, 263, (1876) and cases there cited; as to the issue of prohibitory orders (merely in the nature of injunctions) against a defendant within the jurisdiction: See *Ramlochan Sirkar v. S. M. Kaminsee Debee*, 10 B. L. R., 63 note (1868).

⁶ *Juggodumba Dosses v. Puddomoney Dosses*, 15 B. L. R., 318, 324, 325, 330 (1875). See Kerr on Receivers, 100.

appointed trustees under a deed of endowment of certain land against their co-trustees, who were in possession, the plaintiff alleged that the defendant trustees had ousted the plaintiffs and had committed breaches of trust, and prayed that the deed might be construed and given effect to, and for a declaration that the plaintiffs were entitled to be *sebaits* jointly with the defendants, for the settlement of a scheme for the performance of the worship, for the appointment of a Receiver, for an Injunction to restrain the defendants from interfering with the property, and for an account. By the deed the land was given to idols named therein, and the plaintiffs and defendants were appointed, subject to certain directions, *sebaits* and managers of the property, but were themselves to have no beneficial interest in the property.¹ The land, the subject of the deed, was situated out of Calcutta, but all the parties to the suit resided within the local limits of the High Court's jurisdiction :² it was held that as the parties had no personal beneficial interest in the settled property the suit was not one "for land" within the terms of the Charter, and that the Court had accordingly jurisdiction to entertain it and to appoint, if necessary, a Receiver of such property.³ In respect of the objection that the Court had no power to appoint a Receiver it was said : "It has been the practice of this Court, where it is necessary to do so, in order to enforce

¹ See *The Delhi and London Bank v. Wordie*, 1 L. R., 1 Cal., 261 (1876), per Pontifex, J.

² Where some of the parties opposing the appointment of a Receiver were not subject to the jurisdiction, the Supreme Court, stated that it "would always be careful, for that reason, to limit the appointment to the portion of the estate in the pos-

session of those subject to the jurisdiction, and before the Court." *Budhinath Paul Chowdry v. Bycauntnath Paul Chowdry*, 2 Tay. & Bell, 192 (1851).

³ *Juggodumba Dossee v. Puddomoney Dossee*, 15 B. L. R., 318, 324, 325, 330 (1875); [See remarks on this case in *Jairam Narayan Raje v. Attmaram Narayan Raje*, 1 L. R., 4 Bom., 482, 484, 485 (1890)].

its own decree "to appoint a Receiver in respect of landed property situate in the mofussil, and we feel ourselves justified in following that practice."¹ But in an earlier case where the whole cause of action did not arise in Calcutta and only one defendant was personally subject to the jurisdiction and the immoveable property was in Bombay, the Court was not prepared to say that it could appoint a Receiver for the property which was within the jurisdiction of the Bombay Court; but was of opinion that, whether it might or might not appoint a Receiver of the property in Bombay, it would certainly be a most inconvenient course to adopt.²

Must be considered with reference to the statutory jurisdiction.

§ 21. But in this country the power to make orders *in personam*, though the subject-matter of the suit is without the jurisdiction, must be considered with reference to the limitations on jurisdiction imposed, in the case of the High Courts, by their respective Letters Patent,³ and in the case of Mofussil Courts, by the Civil Procedure Code.⁴ Regard must be had to the real object of the suit and to what are the rights and contentions of the respective parties, and those cases which are founded upon the principle laid down in *Penn v Lord Baltimore* must be distinguished from those which depend, not so much upon the jurisdiction generally exercised by Courts of Equity, as upon the question whether the suit is substantially one within the statutory jurisdiction conferred upon the Courts.⁵ And therefore when a suit, which

¹ *Juggodumba Dossee v. Puddamoney Dossee*, 15 B. L. R., 318, 324, 325, 330 (1875): [See remarks on this case in *Jairam Narayan Raje v. Attmaram Narayan Raje*, I. L. R., 4 Bom., 482, 484, 485 (1880)].

² *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*, 13 B. L. R., 91, 99 (1874).

³ Letters Patent, 1865 (Calcutta), cl. 12.

⁴ Civ. Pr. Code, ss. 16, 16A.

⁵ *The Delhi and London Bank v. Wordie*, I. L. R., 1 Cal., 249, 263 (1876); *Land Mortgage Bank v. Sudarudeen Ahmed*, I. L. R., 19 Cal., 358, 367 (1892).

though in form one brought to obtain an Injunction, is in substance a suit "for land," which land is situate without the local limits of the jurisdiction of the Court, the latter has no power to grant the relief prayed.¹ In the case now cited a suit was brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleging that a certain boundary line existed between the two mines, and praying for a declaration that the boundary line was as alleged, and that the defendants might be restrained by Injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiffs' allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. It was held that the suit was a suit for land within cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try. The grounds upon which the judgment in this case proceeded were that the plaintiffs asked that the defendants be restrained from passing beyond their boundary and committing a trespass on their (the plaintiffs') land, and the line at which the plaintiffs thus sought to stop the defendants was not admitted by the latter to be their boundary line. On the contrary, the defence was that the defendants' land extended to a second line considerably beyond that specified by the plaintiffs. The sole question in dispute between the parties, therefore, was, whether the margin or strip of land between these two lines belonged to the plaintiffs or to the defendants. The suit was substantially brought to have it declared as against the

*The East Indian
Railway Co. v.
The Bengal
Coal Co.*

¹ *The East Indian Railway Co. v. The Bengal Coal Co.*, I. L. R., 1 Cal. 95 (1875).

defendants that this strip belonged to the plaintiffs and was therefore a "suit for land." This case is clearly distinguishable from *Rajmohun Bose v. The East Indian Railway Co.*, where the only question was whether the defendant, a stranger, was liable for a nuisance affecting the plaintiff in the enjoyment of his land, and where there was no question whatever as to the plaintiff's right to the land. So also a suit which is in form one for trespass may be in reality a suit for the possession of land, being brought in that form for the purpose of trying the title to it.¹

*Delhi and
London Bank
v. Wordie.*

Similarly when there is no jurisdiction to entertain a suit on the ground that it is one for immoveable property situated without the local limits of the jurisdiction, the Court will have no power to grant provisional relief by way of the appointment of a Receiver to take charge of the subject-matter of dispute in such suit.² Thus where a suit was brought which, amongst other reliefs, prayed that a Receiver might be appointed to carry out certain trusts, it was *held* that though the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to grant certain forms of relief prayed, including the appointment of a Receiver of the estate, yet inasmuch as the suit was in substance one "for land" within the meaning of the Charter, the Court had no jurisdiction to try it. And accordingly, all relief and of necessity also such appointment, was refused.³ Even when land which was situate out of the local limits of the jurisdiction of the High Court was already in the possession of a Receiver appointed by the late Supreme

¹ See *The Delhi and London Bank v. Wordie*, I. L. R., 1 Cal., 259 (1876), per Garth, C. J.

² *The Delhi and London Bank v.*

Wordie, I. L. R., 1 Cal., 249, 257 (1876), explained in *Kellie v. Fraser*, I. L. R., 2 Cal., 453, 457, 463, 465 (1877).

³ *Ib.*

Court,¹ it was *held* that the High Court could not exercise jurisdiction in respect to such land in a suit which was held to be one "for land" within cl. 12 of the Letters Patent.²

The test, therefore, of jurisdiction in all such cases is rather the nature of the claim made in respect of the property in suit than the actual situation of such property. If the suit is not by reason of its substantial character and the provisions of the Code or Charters, within the cognisance of the Court, the latter is unable to grant relief. But where the relief sought is purely *in personam* and not *in rem*, the Courts are empowered to make a decree, which shall be of the same character.

§ 22. Suits to obtain an Injunction may be entertained by all Civil Courts,³ with the exception of Presidency⁴ Jurisdiction to issue Injunctions.

¹ The jurisdiction of the Supreme Court was not limited in the manner that the jurisdiction of the High Courts is limited: See Charter of Supreme Court, 1774, cl. 13: 1 Smollett & Ryan's Rules and Orders, pp. 9—11; it had the power of dealing with land out of Calcutta: See *Doe d. Colein v. Ramaty*, Morton, 148; *Doe d. Hurlall Mitter v. Hilder*, ib., 183; *Doe d. Bampton v. Petumber Mullick*, Bign., 24; *Doe d. Muddoosoodun Doss v. Mohender Lall Khan*, 2 Boul., 40; *Doe d. Chuttoo Sick Jemadar v. Subbessur Sein*, ib., 151; *Dorab Ali Khan v. Moheeruddeen*, I. L. R., 1 Cal., 55; *Taramoney Dossee v. Kistnogovind Sein*, 2 Morley's Digest, 61.

² *Denonath Sreemoney v. C. S. Hogg*, 1 Hyde, 141 (1862, 1863).

³ With respect to the jurisdiction of the High Court, See 24 & 25 Vic., c. 104, s. 9; Letters Patent, 1862 (Calcutta), ss. 11—21; Letters Patent, 1865 (Calcutta), ss. 11—21; as to the Letters Patent for the other Presi-

dency High Courts, See p. 4, note 6, *ante*. Letters Patent, 1866 (Allahabad), ss. 9—14. As to the Chief Court of the Punjab, See Acts XVII of 1877, XVIII of 1884; and as to the Civil Courts of the Provinces, See Act XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts), ss. 18, 19; Act XIV of 1889 (Civil Courts, Bombay), ss. 7, 12, 16, 24; Act III of 1873 (Civil Courts, Madras), s. 12. As to the jurisdiction of Mamlatdars to issue Injunctions, See *Dessi Molabhai Bapubhai v. Keshavbhai Kuberbhai*, I. L. R., 12 Bom., 419 (1887); *Gulabbhai Gopalji v. Jinabhai Ratanji*, I. L. R., 13 Bom., 213 (1888); *Chintamanrav Narayan Gole v. Bala*, I. L. R., 14 Bom., 17 (1889); *Nemava v. Devandrappa*, I. L. R., 15 Bom., 177 (1890), and Bombay Act III of 1876.

⁴ Act XV of 1882, s. 19, cl. (i). [The Small Cause Court shall have no jurisdiction in suits to obtain an injunction.]

and Provincial¹ Small Cause Courts. The Presidency High Courts have, in addition to the powers granted by the Code and Specific Relief Act, inherited the equitable jurisdiction of the Supreme Courts, which were in their turn generally invested with the power and authority of the Court of Chancery.² But the Civil Procedure Code has laid down with precision the cases in which the Mofussil Courts can grant Injunctions and their jurisdiction is not lightly to be extended in this respect.³ The jurisdiction may be exercised either by Courts of first instance or Courts of Appeal. Under the Code of Civil Procedure, once a suit has been dismissed the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs. On such dismissal an Injunction, which has been granted, comes to an end.⁴ An application, therefore, made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the Receiver may be restrained from parting with funds in his hands pending an appeal, can not be granted.⁵ The Court of first instance has therefore no jurisdiction to maintain an Injunction after the claim is dismissed, or until an appeal shall have been

¹ Act IX of 1887, s. 15, sched. ii, cl. 17 [a suit to obtain an injunction is excepted from the cognisance of a Court of Small Causes]: as to the power to invest District or Subordinate Judges or Munsiffs with Small Cause Court Jurisdiction, see Act XII of 1887, s. 25 (Bengal, N. W. P. and Assam Civil Courts); Act XIV of 1869, s. 28 (Civil Courts, Bombay); Act III of 1873, s. 28 (Civil Courts, Madras).

² v. *ante*, p. 5, notes (3) and (4).

³ *Jaynarain Geeree v. Shibpersad Geeree*, 6 W. R., Misc., 1, 3 (1866).

See remarks as to the applicability of proceedings in equity to Mofussil Courts, *ib.*, and *Roy Luckmiput Singh Bahadoor v. Secretary of State for India*, 11 B. L. R., App., 27, 28 (1873).

⁴ *Yamin-ud-Dowlah v. Ahmed Ali Khan*, 1 L. R., 21 Cal., 561 (1894); *Shaikh Moheezooddeen v. Shaikh Ahmed Hossien*, 14 W. R., 384, 385 (1870); *Gossain Money Pures v. Gour Pershad Singh*, 1 L. R., 11 Cal., 146 (1884); *Ram Chand v. Pitam Mal*, 1 L. R., 10 All., 506 (1888).

⁵ *Yamin-ud-Dowlah v. Ahmed Ali Khan*, *supra*.

lodged, or after the appeal has been admitted during the pendency of the appeal.¹ Nor *a fortiori* when suit for an Injunction is dismissed can the Court which dismisses such suit take upon itself to stay by Injunction the execution of a decree passed in another suit.² But the Appellate Court has the same powers in respect of granting an Injunction which the Court of Original Jurisdiction has, and an application for an injunction pending appeal should be made to it as being the Court having cognisance of the suit.³

A suit for a declaration of right and for an Injunction falls under s. 7, cl. 4, sub-cl. (c) and (d) of the Court Fees Act, VII of 1870. The valuation of the relief sought in such a suit rests with the plaintiff, and not with the Court. So when *A* sued *B* and *C* (1) for a declaration of his title to certain property, and (2) for an Injunction restraining *C* from paying, and *B* from receiving, an allowance of Rs. 2,400 a year out of the income of the property in dispute; *A* valued each of the reliefs sought at Rs. 130, and affixed a Court Fee Stamp of Rs. 20 to the plaint. The Court of first instance rejected the plaint as insufficiently stamped, holding that the claim for the Injunction sought should have been valued at ten times the annual allowance paid by *C* to *B*, as provided by s. 7, cl. 2 of Act VII of 1870. On appeal to the High Court, it was held that the suit fell under s. 7, cl. 4, sub-cl. (c) and (d) of the Court Fees Act, and that the plaintiff had a right to put his own valuation on the relief sought;

¹ See cases cited in note (4), last page.

² *Gossain Money Puree v. Gour Pershad Singh*, supra.

³ *Shaikh Moheesooddeen v. Shaikh Ahmed Hossein*, supra, 385; *Gossain*

Money Puree v. Gour Pershad Singh, supra, 149; *Kirpa Dayal v. Ran Kishori*, I. L. R., 10 All., 80 (1887); *Kanahi Ram v. Biddya Ram*, I. L. R., 1 All., 549, 551 note (1878); See Civ. Pr. Code, ss. 582, 587, 592 608.

it was *held*, also, that the order rejecting the plaint as insufficiently stamped was appealable.¹

In respect of the subject-matter of an Injunction, the latter should, when granted, be strictly confined to the property in dispute. When, therefore, the property in dispute in a suit was not the entire moveable and immoveable property in the possession of the defendant, but the half share to which the plaintiff laid claim, a Court was *held* to have acted beyond its powers in granting an Injunction and in appointing a Receiver in respect of the entire property in the hands of the defendant and not merely of the share claimed by the plaintiff.² It has, however, been *held* that in a suit for partition of a joint estate the Court has jurisdiction to place the whole of the joint estate out of which the plaintiff seeks to have his share partitioned in the hands of a Receiver, and to order that the latter shall be at liberty to raise money on the security of the whole of such joint estate.³ The Court must have jurisdiction in respect of the subject-matter to which the Injunction refers. Jurisdiction to grant an Injunction may be excluded by s. 56 of the Specific Relief Act or by the provisions of some other Act.⁴ Thus under the former Act an Injunction cannot be

¹ *Sardar Singji v. Ganpat Singji*, I. L. R., 17 Bom., 56 (1892). See *Bai Amba v. Pranjivandas Dullabh Ram*, I. L. R., 19 Bom., 198, 201 (1894); cf. *Sardar Singji v. Ganpat Singji*, I. L. R., 14 Bom., 395 (1889).

² *Jaynarain Geeree v. Shidpersad Geeree*, 6 W. R., Misc., 1 (1866); but see next note and *Mun Mohinee Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870), where it was said that "To appoint a receiver and to issue an injunction which shall affect an undivided half share only is an impos-

sibility," per Phear, J.

³ *Poreashnath Mookerjee v. Omerto Nauth Mitter*, I. L. R., 17 Cal., 614 (1890).

⁴ *Mahip Singh v. Chotu*, I. L. R., 5 All., 429, 430 (1883), e.g., by the provisions of s. 95 of Act XII of 1881 (N. W. P. Rent Act). Section 56 of the Specific Relief Act has particular reference to perpetual injunctions only, but the general principles respecting the grant of all injunctions are to be sought for in this Act. - v. *ante*, p. 7.

granted to stay a judicial proceeding pending at the institution of the suit in which the Injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings; nor to stay proceedings in a Court not subordinate to that from which the Injunction is sought;² nor to stay proceedings in any criminal matter.³ And indeed, as has been already observed,⁴ the Court has no jurisdiction to interfere by Injunction in matters merely criminal or merely immoral, which do not effect any right to property. Nor has the Court jurisdiction to interfere with the public duties of any department of the Government of India or the Local Government or with the sovereign acts of a Foreign Government;⁵ nor to restrain persons from applying to any legislative body;⁶ nor do matters of a political nature come within the jurisdiction of the Court.⁷ And as the jurisdiction of the Court is governed upon strictly equitable principles, it will not, and is not empowered to, grant an Injunction when the conduct of the applicant or his

¹ Act I of 1877, ss. 56 (a), 54, cl. (e), illa. (p), (q); Kerr on Injunctions, 7, 8, 587, 588; Story's Equity Jur., §§ 852—860; See *Bheer Chunder Jhoograj Goshanee v. Hogg*, Cor. 56 (1864); *Lutcheemund Sett v. S. M. Komulmonee Dosee*, 1 Ind. Jur. N. S., 9 (1866); *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 358, 359, 366 (1875); *Dhuronidhur Sen v. Agra Bank*, 1 L. R., 4 Cal., 380 (1878); I. L. R., 5 Cal., 86 (1879); *Kirpa Dayal v. Rani Kishori*, I. L. R., 10 All., 80, 82 (1887); *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 214, 220 (1887); *Appu v. Raman*, I. L. R., 14 Mad., 425, 429, 430 (1891); *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338 (1895); See *post*.

² Act I of 1877, s. 56, cl. (b); See

Dhuronidhur Sen v. Agra Bank, I. L. R., 4 Cal., 380 (1878); *Mahip Singh v. Chotu*, I. L. R., 5 All., 429 (1883); *Appu v. Raman*, I. L. R., 14 Mad., 425 (1891); *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338 (1895); See *post*.

³ Act I of 1877, s. 56, cl. (e); See *post*.

⁴ *v. ante*; Kerr on Injunctions, 5; Snell's Equity, 11th Ed., p. 582.

⁵ Act I of 1877, s. 56, cl. (d); Kerr on Injunctions, 4.

⁶ Act I of 1877, s. 56, cl. (c); See Kerr on Injunctions, 6, 7.

⁷ Kerr on Injunctions, 5; *Emperor of Austria v. Day*, 3 D. F. & J., 217; *United States v. Prioleau*, 2 H. & M., 559, 2 Equity, 659.

agents has been such as to disentitle him to the assistance of the Court;¹ to prevent a continuing breach in which the applicant has acquiesced;² or, since an Injunction is an exceptional form of relief, when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;³ or when the applicant has no personal interest in the matter.⁴ Lastly, when the subject-matter of the Injunction is the breach of a contract, or the committal of the tort of nuisance, an injunction cannot be granted in the first place to prevent the breach of a contract, the performance of which would not be specifically enforced;⁵ nor in the second to prevent, on the ground of nuisance, an act, which it is not reasonably clear will be a nuisance.⁶

The exercise of jurisdiction is discretionary.

§ 23. "Under the Specific Relief Act the Courts are given a discretion to grant or withhold an Injunction,⁷ as in England they have a discretionary power to award damages in lieu of an Injunction.⁸ In this view of the

¹ Act I of 1877, s. 56, cl. (i), ill. (a); *Littlewood v. Caldwell*, 11 Prieo, 97, ill. (b); *Morgan v. McAdam*, 36 L. J., Ch., 228, ill. (c); *Perry v. Truefitt*, 6 Beav., 76.

² Act I of 1877, s. 56, cl. (h).

³ Act I of 1877, s. 56, cl. (i); as to the meaning of "trust" and "trustee," v. ib., s. 3.

⁴ Act I of 1877, s. 56, cl. (k).

⁵ Act I of 1877, ss. 56, cl. (f), 54; but see *ib.*, s. 57. In the matter of *Gunput Narain Singh*, I. L. R., 1 Cal., 74, 78 (1875); *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 280, 281 (1881); *Madras Railway Company v. Rust*, I. L. R., 14 Mad., 18 (1890); *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702 (1894); I. L. R., 19 Bom., 764 (1895) same case in appeal, and see

post.

⁶ Act I of 1877, s. 56, cl. (g). See *post.*

⁷ Act I of 1877, s. 52; *Shadi v. Anup Singh*, I. L. R., 12 All., 439 (1889). As to discretion. See *per* Lord Mansfield in *Wilke's case*, 4 Burn., 2539, cited in *Harbans Sahai v. Bhairo Pershad Singh*, I. L. R., 5 Cal., 259, 266 (1879). See also remarks in *Queen-Empress v. Chagan Dayaram*, I. L. R., 14 Bom., 331, 344, 352 (1890), *per* Jardine, J.

⁸ Formerly under Lord Cairn Act, 21 & 22 Vic., c. 27, and now under the Judicature Act, 1873. See *Kerr on Inj.* 39, and *The Land Mortgage Bank of India v. Ahmedbhoj Habibbhoj*, I. L. R., 8 Bom., 70, 71 (1883); *Dhunibhoj Cowarji Umrigar v. Lisboa*, I. L. R., 13 Bom., 260, 261 (1888).

law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed, but also whether under all the circumstances of the case he ought to be granted an Injunction as the proper and appropriate remedy for such infringement.¹ The Court has a discretion to refuse all relief or to refuse an Injunction and to give damages, where these are the appropriate remedy,² or to combine damages with a limited Injunction.³ But if a Court refuses an Injunction on the ground that pecuniary compensation is the plaintiff's proper remedy it ought not to dismiss the suit, but ought either itself to award damages or to order an enquiry as to damages:⁴ and when a right is established, as to an easement, the plaintiff is entitled either to an Injunction or to damages and is not obliged to accept some third form of relief.⁵ This discretion is a reasonable discretion, and it must depend upon the special circumstances of each case, whether it ought to be exercised.⁶ And where the issue of an Injunction is the subject of appeal, it is for the defendant-appellant against whom it is granted to show that the lower Court has exercised a wrong discretion.⁷ Courts of Equity have, however, constantly declined to lay down any rule which shall limit their power and discretion as to the particular cases in which Injunctions shall

¹ *Per* Farran, J., in *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., (1894) at p. 488.

² *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, *supra*, 70.

³ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, *supra*, 77, 91.

⁴ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 19 Bom., 764 (1895).

⁵ *Kadarbhai v. Rahimbhai*, I. L. R.,

13 Bom., 674 (1889).

⁶ *Per* Jessel, M. R., in *Aynsley v. Glover*, 18 Eq., 546, cited in *Dhunjibhoy Cowasji Umrigar v. Liebova*, I. L. R., 13 Bom., 260, 261 (1888); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 70, 71 (1883).

⁷ *Shadi v. Anup Singh*, I. L. R., 12 All., 436 (1889).

be granted or withheld ; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights, or redress wrongs. This jurisdiction is manifestly indispensable and should be fostered and upheld. At the same time its exercise is attended with no small danger both from its summary nature and its liability to abuse. It ought therefore to be guarded with extreme caution,¹ and applied only in very clear cases, otherwise it may become a means of extensive, and perhaps of irreparable, injustice.² In granting relief the Court proceeds upon principles of general, or particular, application which will be found hereinafter discussed in their appropriate places. Generally speaking, the Court will consider, amongst other things whether the doing of the thing sought to be restrained must produce an injury to the person seeking the Injunction ; whether such Injunction will operate oppressively or inequitably or contrary to the real justice of the case, or will work an immediate mischief or fatal injury. It will not interfere where there has been acquiescence in the mischief sought to be restrained or in cases of gross laches or delay by the party seeking the relief in enforcing his rights ; not to enforce covenants which are unreasonable and from which inconvenient consequences may ensue ; nor in cases where its interference can have no effect : nor when equally efficacious relief can certainly be obtained by any other usual mode of proceeding. And even where the plaintiff has made out a case for relief the Court will consider whether an Injunction is the

¹ See *Mun Mohiney Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870), per Phear, J. :—" I need hardly say that the power of issuing Injunctions and appointing a Receiver *pendente lite* which is given to the Civil Court

by s. 92, Act VIII of 1859, ought to be most cautiously exercised." *Ohunilal v. Surat City Municipality*, I. L. R., 27 Bom., 403 (1903).

² Story, Eq. Jur., § 959b, and cases there cited.

fit and appropriate mode of redress under all the circumstances of the case.¹

The appointment as well as the removal of a Receiver is also a matter which rests in the sound discretion of the Court.²

Reference has already been made (i) to the nature and subject-matter of an Injunction regarded by itself, (ii) the persons in whose favour and (iii) against whom its issue will be directed; there still however remains (iv) the question by whom an Injunction may be granted: an enquiry which involves directly a consideration of the Courts which possess this equitable power, and ancillary thereto, a further consideration of those principles upon which this power is exercised, as well of the relief which may be granted in suits in which an Injunction is prayed.

§ 24. Suits to obtain an Injunction may, as already observed, be entertained by all Civil Courts, with the exception of Presidency and Provincial Small Cause Courts.³ Assuming that the Court is one of competent jurisdiction and that those conditions exist in the facts of the particular case, which are necessary to the exercise of this jurisdiction,⁴ it may be so exercised either by a Court of first instance, or by a Court of appellate, or revisional jurisdiction at the time and subject to the conditions hereinafter mentioned.

A Court of first instance may grant under the provisions of the Code a temporary Injunction to continue until a specified time or until the further order of the

Courts by which an Injunction may be granted.

(i) Courts of Original Jurisdiction.

¹ Story, Eq. Jur., § 959a. See Act I of 1877, ss. 54, 56.

² Act I of 1877, s. 44; Kerr on Receivers, 3; *Sidhenvari Dabi v. Abhyasvari Dabi*, I. L. R., 15 Cal., 818, 822, 823 (1888); *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R.,

22 Cal., 459, 464, 465 (1895). Ex-parte *Jijai Amba*, I. L. R., 13 Mad., 390 (1890) [removal of Receiver.] See Author's Law of Receivers.

³ *Ante*, p. 55.

⁴ See *ante*.

Court.¹ This Injunction may be granted at any period of a suit,² but is usually applied for and obtained by motion *ex parte*, or on notice after the presentation of the plaint,³ and before the hearing upon the trial. A temporary Injunction may be granted even after the hearing and decree. In the undermentioned case⁴ which was one for ejectment, the Court granted a decree for possession of the land. Plaintiff's counsel at the close of the case stated that he was instructed that the defendant was then removing the materials of the house on the premises in dispute, and asked for an Injunction to restrain the removal. The Court granted an Injunction *nisi* to be made absolute with cost, if cause were not shown against it within four days. Cause was shown by the defendant who alleged the existence of a custom under which he was entitled to remove the materials above-mentioned. The Court then continued the Injunction, and gave leave to the defendant to bring a suit within two months to establish the special custom alleged, and ordered that in default of such suit being brought (as it in fact never was) the Injunction should be made perpetual with costs. If the suit is decreed upon the merits and (as only can then be done)⁵ relief by way of permanent Injunction is granted, such Injunction will, of course, as a portion of such decree subsist pending, and

¹ Act I of 1877, s. 53; Civ. Pr. Code, ss. 492, 493.

² Act I of 1877, s. 53.

³ According to English practice in an urgent case an *interim* injunction may be granted before bill filed on the plaintiffs undertaking to file the bill at once; *Thornla v. Skoines*, 16 Eq., 126; *Carr v. Morice*, 16 Eq., 125. See Eden, Inj., 45-48, 320; Drewry, Inj., 346, 360-362, 364. As upon such undertaking the suit may be said

to be practically instituted, and as the issue of the injunction is made dependent upon its fulfilment, there would seem to be no objection to the adoption of this practice in Indian Courts. In other than urgent cases the rule in England, as in this country, is that the statement of claim or plaint must be first filed, Kerr, Inj., 612.

⁴ *Doyalchand Laha v. Bhoyrab-nath Khettry*, Cor., 117 (1864).

⁵ Act I of 1877, s. 53.

its operation will not be stayed by reason only of an appeal. When a decree has been made and fully carried out in a cause, the cause is out of Court and a motion for Injunction cannot be made in that cause, although there may be ample ground for sustaining it in a new cause.¹ A perpetual Injunction is final, and it is not necessary to revive it upon the death of either of the parties, in order to keep it on foot; for if so it would in effect be decreeing a perpetual suit.² And, if a suit for an Injunction is *dismissed*, any temporary Injunction which may have been granted comes to an end.³ The power of the Court in such matters extends only over the subject-matter of the suit, and therefore when the suit comes to an end and when there can be no longer any decree to satisfy, or any property coming to the plaintiff in that suit, there can be no further ground for the continuance of an Injunction or like measure. The Court, which dismisses such a suit, becomes *functus officio*, save that it may stay execution of its own decree or order for costs. An application, therefore, as in the case cited in the next paragraph, made to a Court of first instance after dismissal of the suit, but *before* appeal filed, asking that a Receiver may be restrained from parting with funds in his hands, pending an appeal, is not within the jurisdiction of such Court to grant. But the dismissal of the action does not prevent the plaintiff from bringing another for the same purpose under a different set of circumstances⁴ or upon new facts.⁵

¹ *Ford v. Compton*, 1 Cox, 296, *Drewry, Inj.*, 360.

² *Askew v. Townsend*, 2 Dick., 471, cit. in *Morgan v. Scudamore*, 2 Ves., 316; *Yeomans v. Kilvington*, 1 Dick., 371. As to abatement, *See Kerr, Inj.*, 636; *Eden, Inj.*, 129, 130.

³ *v. post.*

⁴ *Mayor of Liverpool v. Chorley Water Works Co.*, 2 D. M. & G., 852; *Castelli v. Cork*, 7 Ha., 89, 99.

⁵ *Att.-Gen. v. Sheffield Gas Co.*, 3 D. M. & G., 304, 341.

Yamin-ud-Doula v. *Ahmed Ali Khan*.

The powers of the Court of first instance was the subject of discussion in the recent case of *Yamin-ud-Doula* v. *Ahmed Ali Khan*,¹ a suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent-decree and which was dismissed with costs, it being held that the compromise embodied in the decree was binding upon all the parties to the suit. An application was then made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the Receiver appointed in the former suit, and the question arose whether, under the circumstances, the Court had jurisdiction to make the order asked for. Various English authorities were cited and dealt with in the judgment. In the case of *Wilson v. Church*,² where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M. R., with the concurrence of Brett and Cotton, LL. J., that that Court had no jurisdiction to entertain an application for an Injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of Appeal. In the later case of *Otto v. Lindford*,³ where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal and that that question differed entirely from the question which had been determined in the previous case of *Wilson v. Church*. It was held that the practical result of these two cases was to establish the rule that, when

¹ I. L. R., 21 Cal., 561 (1894).

² L. R., 18 Ch. D., 394.

³ L. R., 11 Ch. D., 576.

an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action. In this country the power which the English Courts have of staying proceedings for costs under an order of dismissal is given by section 545 of the Civil Procedure Code. No doubt in the case of *Polini v. Gray*,¹ the Court of Appeal, consisting of the same Judges who decided the other cases to which reference has been made assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimants' right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. But there were in that case circumstances which serve to distinguish it from the preceding case of *Wilson v. Church*, one of the circumstances being that, in order to enable an application to be made for an *interim* Injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is sufficient that in the later case of *Otto v. Lindford*, the case of *Wilson v. Church* is expressly referred to and is treated as a continuing authority. It was *held* therefore that, reading the case of *Polini v. Gray*, with the later case of *Otto v. Lindford*, the proper conclusion was that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords.² No procedure exists under which an

¹ L. R., 12 Ch. D., 438.

² See *Hamill v. Lilley*, L. R., 19 Q. B. D., 83.

Yamin-ud-Doulah v. Ahmed Ali Khan.

The powers of the Court of first instance was the subject of discussion in the recent case of *Yamin-ud-Doulah v. Ahmed Ali Khan*,¹ a suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent-decree and which was dismissed with costs, it being held that the compromise embodied in the decree was binding upon all the parties to the suit. An application was then made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the Receiver appointed in the former suit, and the question arose whether, under the circumstances, the Court had jurisdiction to make the order asked for. Various English authorities were cited and dealt with in the judgment. In the case of *Wilson v. Church*,² where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M. R., with the concurrence of Brett and Cotton, LL. J., that that Court had no jurisdiction to entertain an application for an Injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of Appeal. In the later case of *Otto v. Lindford*,³ where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal and that that question differed entirely from the question which had been determined in the previous case of *Wilson v. Church*. It was held that the practical result of these two cases was to establish the rule that, when

¹ I. L. R., 21 Cal., 561 (1894).

² L. R., 18 Ch. D., 394.

³ L. R., 11 Ch. D., 578.

an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action. In this country the power which the English Courts have of staying proceedings for costs under an order of dismissal is given by section 545 of the Civil Procedure Code. No doubt in the case of *Polini v. Gray*,¹ the Court of Appeal, consisting of the same Judges who decided the other cases to which reference has been made assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimants' right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. But there were in that case circumstances which serve to distinguish it from the preceding case of *Wilson v. Church*, one of the circumstances being that, in order to enable an application to be made for an *interim* Injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is sufficient that in the later case of *Otto v. Lindford*, the case of *Wilson v. Church* is expressly referred to and is treated as a continuing authority. It was *held* therefore that, reading the case of *Polini v. Gray*, with the later case of *Otto v. Lindford*, the proper conclusion was that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords.² No procedure exists under which an

¹ L. R., 12 Ch. D., 438.

² See *Hamill v. Lilley*, L. R., 19 Q. B. D., 83.

application for an *interim* Injunction can be made to the House of Lords direct. The jurisdiction exercised by the Appeal Court in *Polini v. Gray*, in respect of an application which could not be made to the higher tribunal, was therefore one strictly of necessity. The other cases which were cited in support of this application, of which *Brewer v. Yorke*¹ may be referred to as an example, deal with the power of the Court to stay execution of its own order, and were *held* to have no bearing on the present question.

A point was especially made of the fact that in this case no appeal had as yet been filed, and that the filing of the appeal had been purposely delayed in order to admit of the present application being made to the Court of first instance. In *Wilson v. Church* it is true an appeal would seem to have been filed, which was followed by an application to the Appellate Court for an Injunction. But this distinction was held to be immaterial. For the decision in *Wilson v. Church* proceeded on the ground that the Court of first instance had no power to interfere, not because an appeal had been filed, but because the suit had been dismissed. It was further *held* that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit.² This view is (as was pointed out in the judgment) supported by the earlier Indian cases which were then cited, viz., *Moheooddeen v. Ahmed*

¹ L. R., 20 Ch. D., 689.

² *Yamin-ud-Douclah v. Ahmed Ali Khan*, I. L. R., 21 Cal., 561, 563—565 (1894), *per Sale, J.* See *Green*

v. Pulsford, 2 Beav., 70. [If the action is dismissed the injunction goes of course. A motion or order for its dissolution is not necessary.]

Hossein,¹ and *Gossain Money Puree v. Guru Pershad Singh*.² The application for an Injunction was in consequence refused with costs.

If therefore the Court of first instance has *before*³ appeal no jurisdiction to continue, and maintain⁴ or to grant⁵, an Injunction after the claim is dismissed, and until an appeal shall have been lodged or pending the appeal, it has no jurisdiction *after*⁶ the appeal has been admitted to issue an Injunction during the pendency of the appeal. Nor *a fortiori* when a suit for an Injunction is dismissed can the Court, which dismisses such suit, take upon itself to stay by Injunction the execution of a decree passed in another suit. So in *Gossain Money Puree v. Guru Pershad Singh*⁷ a rule was made absolute which had been applied for under the following circumstances :—

One Gossain Money Puree had obtained a decree *Gossain Money Puree v. Guru Pershad Singh.* against one Chucka Sing in the Gya court, dated the 30th August 1880, by which the sale of certain property, which had been mortgaged to him by Chucka Sing, was ordered to be made. That decree had been confirmed by the High Court. Chucka was the father of a Mitakshara family; and after this decree had been obtained his sons brought another suit to have it declared that they were entitled to certain shares in the property which had been ordered to be sold and which Chucka Sing had no right to mortgage. Meanwhile the mortgagee, the plaintiff in the first suit, proceeded to execute his decree; but the plaintiffs in the second suit (the

¹ 14 W. R., 384 (1870).

² I. L. R., 11 Cal., 146 (1884).

³ *Yamin-ud-Dowlah v. Ahmed Ali Khan*, supra.

⁴ *Shaikh Mohacooddeen v. Shaikh Ahmed Hossein*, 14 W. R., 384, 385

(1870).

⁵ *Yamin-ud-Dowlah v. Ahmed Ali Khan*, supra.

⁶ *Shaikh Mohacooddeen v. Shaikh Ahmed Hossein*, supra.

⁷ I. L. R., 11 Cal., 146 (1884).

sons) applied for and obtained an *interim* Injunction from the Subordinate Judge against the plaintiff in the first suit, restraining him from selling the property, until the second suit should have been heard and decided. On the 20th of December 1883 that suit came on to be heard and was decided against the plaintiffs (the sons of Chucka Sing); whereupon, on the 30th of January 1884, the plaintiff in the first suit (the mortgagee) applied for execution against the mortgaged property, and the usual sale-proclamation was issued. The plaintiffs in the second suit, however, who had appealed from the decree which had been made against them applied for and obtained from the Subordinate Judge, on the 14th of May 1884, a further Injunction, restraining the plaintiff in the first suit from executing his decree, until the appeal in the second suit should have been heard. A rule was then obtained in the High Court by Gossain Money Puree calling upon the sons of Chucka Sing to show cause why the order of the 14th May 1884 should not be set aside. The rule was obtained upon the ground (amongst others) that the Subordinate Judge had no right, under the circumstances to grant the Injunction, inasmuch as he had decided against the claim of the plaintiffs in the second suit, and had nothing to do with the appeal to the High Court.

It was contended on behalf of the plaintiffs, that by analogy to section 546 of the Code of Civil Procedure, the Subordinate Judge, if he considered it right and equitable, had jurisdiction to stay execution in the other suit, until the appeal to the High Court had been heard. It was held, however, that section 546 had nothing to do with the question before the Court, and that section only related to *staying proceedings in execution by the Court which passed the decree in which the proceedings*

are pending. That Court has a right under certain circumstances and subject to certain conditions, to stay the execution of its own decrees while those decrees are under appeal.

But in the present case the lower Court had taken upon itself in this suit to stay the execution of a decree, which had been pronounced by the High Court in another suit. It was held that the Subordinate Judge had in point of law no power to deal with the proceedings in that other suit at all. He had a right, whilst the question in this suit was awaiting trial, to restrain the defendants by an *interim* Injunction from enforcing his decree in the former suit. That he might do *by an order upon the defendants personally*. But as soon as those questions were decided against the plaintiffs, the Subordinate Judge had no right to restrain the defendant further, upon the mere possibility of the Appellate Court reversing his decree; and it is clear that he had no right to do so under the section of the Code upon which he appeared to have acted.

It was observed in conclusion that, if any Court had a right to grant an Injunction at that stage, it would be the Court of Appeal, but that it was no part of the Court's present duty to decide whether any Court had such a power, or still less that, having the power, it ought to exercise it. The Appellate Court, however, held that the Court below, having made a decree against the plaintiffs, had no right, in aid of the plaintiffs, to restrain the defendant from proceeding in the other suit, and accordingly the rule was made absolute with costs.¹

A Court of first instance may, however, review its own decree and order,² or stay the execution of its own

¹ *Gossain Money Puree v. Guru* (1884).
Pershad Singh, I. L. R., 11 Cal., 146 ² Civ. Pr. Code, s. 623.

decree.¹ Execution of a decree is not stayed solely by reason of an appeal, but, if an application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may for sufficient cause order the execution to be stayed, provided it is satisfied that substantial loss may result to the party applying for stay of execution unless the order is made, that there has been no unreasonable delay, and that security² has been given by the applicant.³ The usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree.⁴ The Court may, however, stay the execution of a decree and suspend the operation of a Injunction given thereby, if there be danger of irreparable mischief being done in the meantime.⁵

(ii) *Courts of
Appellate Juris-
diction.*

The Appellate Court has the same power in respect of granting an Injunction which the Court of original jurisdiction has. If therefore a party whose suit has been dismissed desires to have any measure taken for the preservation of the property or right which he claims, he is at liberty after filing his appeal to apply to the Appellate Court which has authority to make such an order and which will, on a proper case, restrain the act complained of pending the determination of the appeal.⁶ The

¹ Civ. Pr. Code, s. 545.

² See, however, Civ. Pr. Code, s. 547, according to the provisions of which no security is required from Government or public officers.

³ Civ. Pr. Code, s. 545, as to security in case of order for execution of decree appealed against. See ss. 546, 547, *ib.*

⁴ *Walford v. Walford*, L. R., 3 Ch. App., 812, 814, *per* Sir W. Page Wood, L. J.

⁵ *Id.*; *Rorkell v. Whitworth*, 19 W. R. (Eng.), 804, 807.

⁶ *Shaikh Mohecooddeen v. Shaikh Ahmed Hossein*, 14 W. R., 384, 385 (1870); *Gossain Money Purse v. Gura Preshad Singh*, 1. L. R., 11 Cal., 146,

Injunction may be issued either in regular,¹ or special,² appeal. In granting an Injunction the Appellate Court will be influenced by those considerations which weigh with Courts of original jurisdiction in entertaining applications of the same kind. It will consider amongst other things whether there is a danger of multiplicity of proceedings and whether any practical injury will be caused by the issue of an order.³ It is, however, apprehended that, having regard to the fact that there has been an adjudication upon the legal right in the decree appealed from, the issue of Injunctions by Appellate Courts will be confined within strict limits and only to clear cases where otherwise irreparable damage would ensue upon principles similar to those which regulate the stay of execution of decrees. The Court may further safeguard the interests of the party against whom the order is made by making the issue of the Injunction dependent on security being given by the applicant.⁴

As in the case of Original Courts, a Court of Appeal may on a proper case review its own decree or order,⁵ and may for sufficient cause order the execution of decrees passed by Subordinate Courts to be stayed pending the hearing of the appeal.⁶ When there has been no application for a stay of execution, or, if such an application be refused, the appeal may yet be advanced. So an appeal from a decree granting an Injunction to restrain the use of a trade-mark was ordered to be advanced, on the ground that the injury

149 (1884); *Kirpa Dayal v. Rani Kishori*, I. L. R., 10 All., 80 (1887); *Wilson v. Church*, 11 Ch. D., 576; *Kerr, Inj.*, 30; *Kanahi Ram v. Biddya Ram*, I. L. R., 1 All., 549, 551, note (1878); *See* Civ. Pr. Code, ss. 582, 587, 592, 608.

¹ *Kirpa Dayal v. Rani Kishori*, *supra*.

² *Kanahi Ram v. Biddya Ram*, *supra*.

³ *Kirpa Dayal v. Rani Kishori*, *supra*.

⁴ *Kirpa Dayal v. Rani Kishori* I. L. R., 10 All., 80 (1887); and *see* s. 493, Civ. Pr. Code.

⁵ Civ. Pr. Code, s. 623.

⁶ *Ib.*, s. 545.

done to the defendant by the continuance of the Injunction, if wrongly granted, would be irreparable.¹ If a Receiver has been appointed, but the facts proved only warrant the issue of an Injunction, the Appellate Court will set aside the order appointing a Receiver and in lieu thereof will issue an Injunction.² An appeal from a final Injunction does not suspend its operation, and the doing of the act enjoined may be punished as a contempt notwithstanding such appeal. But when an interlocutory Injunction is granted upon the filing of the bill, but the bill is dismissed upon the hearing and plaintiffs thereupon appeal, the appeal does not have the effect of reviving the Injunction; and defendants are not therefore liable for contempt in doing the act, which had been originally enjoined, pending such appeal.³

(iii) *Courts of
Revisional
Jurisdiction.*

The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally, or with material irregularity; and may pass such order in the case as it thinks fit.⁴ And so when an applicant obtained a rule to show cause why an order of Injunction should not be set aside on, amongst others, the grounds that it had been made and issued without jurisdiction; the High Court made the rule absolute with costs setting aside the order of Injunction complained of.⁵ And so also where a petition praying for a temporary Injunction in a suit was pre-

¹ *Lazenby v. White*, L. R., 6 Ch. App., 89.

² *Chandidal Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459 (1895).

³ High, Inj., § 1431.

⁴ Civ. Pr. Code, s. 622.

⁵ *Gossain Money Purce v. Guru Pershad Singh*, I. L. R., 11 Cal., 146 (1884), *supra*.

sented by the plaintiff in a Subordinate Court, but the Judge having refused to pass orders on it, without hearing the defendants and having ordered notice to issue to them, the plaintiff appealed to the District Judge, who granted the Injunction prayed for; it was *held* upon revision that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law and the order was set aside.¹

§ 25. Assuming that in any particular case the Court has jurisdiction to grant relief, and that the circumstances are such that it would be a proper exercise of its discretion to do so, and that it has in fact done so either by ordering an Injunction to issue or a Receiver to be appointed, it remains to be considered how these orders are enforced and made effectual to secure the redress sought by those in whose favour they are made. A judgment of the Court which is *in personam* may be enforced by process *in personam*, that is, by attachment of the person when the person is within the jurisdiction or by sequestration of the goods or lands of the defendant, when these are within the jurisdiction of the Court, until the defendant do comply with the judgment or order of the Court.² This power of attachment, which has been termed the keystone of the equitable jurisdiction, results from the first principles of judicial establishments and must be an inseparable attendant upon every superior tribunal. Under the authority conferred by the Charters of the Supreme Courts and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obedience to their orders by attachment for

Enforcement of
orders and
decrees issuing
Injunctions.

¹ *Luis v. Luis*, I. L. R., 12 Mad., 186 (1888).

² *Penn v. Lord Baltimore*, 1 Ves., 444; v. *ante*.

contempt,¹ and they have all the powers of a Court of Equity in England for enforcing their decrees *in personam*.² The jurisdiction of the High Court to imprison for contempt is a jurisdiction that it has inherited from the old Supreme Court, and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code.³ The question as to the power of the Mofussil Courts to commit for contempt otherwise than under the authority of special statutory enactments conferring, or of case-law recognising, that power, which was considered in the last edition to be a matter of doubt,⁴ has been recently dealt with by the Madras High Court which has held that a District Court is not a Court of Record, and, as such, has no inherent power to commit for contempt. The jurisdiction which a District Court has to commit in case of disobedience to an Injunction is conferred by section 493 of the Code of Civil Procedure, but the powers conferred by that section are only exerciseable when the Court is put in motion by a party who deems himself aggrieved.⁵

The Civil Procedure Code has, however, invested all Civil Courts with powers for enforcing their orders or

¹ *Hassonbhoy v. Cowasji Jehangir Jassawalla*, I. L. R., 7 Bom., 1 (1881); *Navivahoo v. Narotamdas Candas*, I. L. R., 7 Bom., 5 (1882).

² *H. H. Shrimant Maharaj Yashwantrav Holkar v. Dadabhai Cursetji Ashburner*, I. L. R., 14 Bom., 353, 359 (1890); *per Sargent, C. J.*, citing *Martin v. Lawrence*, I. L. R., 4 Cal., 655 (1879); *Hassonbhoy v. Cowasji Jehangir Jassawalla*, I. L. R., 7 Bom., 1 (1881). As to the practice of the English Courts in the case of the

breach of an Injunction, *v. post*, p. 86.

³ *Martin v. Lawrence*, I. L. R., 4 Cal., 655 (1879), *per White, J.*; *Hassonbhoy v. Cowasji Jehangir Jassawalla*, *supra*, at p. 4; *Navivahoo v. Narotamdas Candas*, *supra*, at pp. 12, 13.

⁴ See *Hassonbhoy v. Cowasji Jehangir Jassawalla*, *supra*, at p. 3; *Navivahoo v. Narotamdas Candas*, *supra*, at pp. 13, 14.

⁵ *Kochappa v. Sachi Devi*, I. L. R., 26 Mad., 494 (1902).

decrees granting Injunctions. In case of disobedience of an order granting a temporary Injunction, such Injunction may be enforced by the imprisonment of the defendant for a term not exceeding six months,¹ or the attachment of his property, or both.² But no attachment under this section shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the Injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.³ Section 493 of the Code thus provides a specific penalty for the breach of an Injunction, but it does not provide that one of the penalties which result from the infringement of an Injunction is that any dealing with property, the subject of such an Injunction, contrary to the terms of the Injunction, is illegal and void. The words of the section are not to be read as providing for any other penalty than that which is therein specially mentioned.⁴

The Code has also provided for the enforcement of decrees granting permanent Injunctions.⁵ In the case of non-compliance by the defendant with such a decree the proper remedy open to the plaintiff to compel performance or abstention is in execution, and no suit will lie for damages for such non-compliance.⁶ Thus the defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass and an Injunction, and a decree was passed for damages and for a mandatory Injunction

Jawatri v. H. A. Emile.

¹ See *Martin v. Lawrence*, supra, (1887); followed in *Manohar Das v. Ram Autar Pande*, I. L. R., 25 All., at p. 657.

² Civ. Pr. Code, s. 493.

431 (1903).

³ Civ. Pr. Code, s. 493.

⁵ Civ. Pr. Code, s. 280; v. post.

⁴ *The Delhi & London Bank v. Ram Narain*, I. L. R., 9 All., 497, 499

⁶ *Jawatri v. H. A. Emile*, I. L. R., 13 All., 98 (1890).

directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory Injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit. It was *held*, distinguishing the case from that of *Mitchell v. Darley Main Colliery Co.*,¹ that the suit would not lie for damages for non-compliance with the mandatory Injunction, to compel the performance of which the plaintiff had his remedy in execution, in the manner provided in the Code.² By the terms of the latter, when the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the performance of, or abstention from, any other particular act has been made, has had an opportunity³ of obeying the decree or Injunction, and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.⁴

The Code has prescribed the manner in which the decree is to be enforced, namely, by imprisonment, or attachment of property, or by both, and the decree is enforceable

¹ L. R., 11 App. Cas., 127. (This was a suit for damages by reason of the excavation by the defendant company of coal without leaving support for the surface. Subsidence occurred, and compensation was given for that damage. Subsequently a fresh subsidence occurred, and it was held

that such subsidence gave a fresh cause of action.)

² *Jawatri v. H. A. Emile*, *supra*.

³ See *Kishore Bun Mohunt v. Dwarkanath Adhikari*, I. L. R., 21 Cal., 784 (1894).

⁴ Civ. Pr. Code, s. 260,

only in the manner prescribed.¹ Thus where the execution of a decree was sought which directed the defendant to pull down and remove an obstruction the Lower Court was held to have been in error in directing an order to issue to the Nazir to remove such obstruction.² When any attachment under this section of the Code has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, the property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation, as it thinks fit, and may pay the balance, if any, to the judgment-debtor on his application.³ If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made and granted, the attachment shall cease to exist.⁴

Section 188 of the Penal Code, dealing with the offence of disobedience to an order duly promulgated by a public servant, applies to orders made by public functionaries for public purposes, and not to an order made by way of Injunction in a civil suit between party and party.⁵

If an Injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the Injunction has been infringed, an attachment will issue, even though the

¹ *Bhoobun Mohun Mundal v. Nobin Chunder Ballub*, 10 B. L. R., Ap. 12 S.C., 18 W. R., 282 (1872); *Protap Chunder Doss v. Peary Chowdhraïn*, 9 C. L. R., 453 S.C., I. L. R., 8 Cal., 174 (1881).

² *Protap Chunder Doss v. Peary Chowdhraïn*, *supra*, in which also the procedure to be observed in an

application for execution is pointed out: see also *Bhoobun Mohun Mundal v. Nobin Chunder Ballub*, *supra*.

³ Civ. Pr. Code, s. 260

⁴ *Ib.*

⁵ In the matter of the petition of *Chandra Kanta De*, 7 C. L. R., 350 S.C., I. L. R., 6 Cal., 445 (1880).

defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the Injunction. The Court in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment as to the probable effect of the structure complained of.¹ In the case now cited an attachment was ordered to issue, but at the suggestion, and by the consent of the plaintiff, the writ was ordered to lie in the office for a fortnight before being executed, in order to afford the defendants time to propose terms of arrangement.²

An Injunction does not run with the land. So in the undermentioned case³ the plaintiff obtained a decree restraining the defendant in his user of certain land and applied for execution. Meanwhile the land had been sold in execution of another decree against the defendant and the purchaser at the Court-sale obtained possession. The plaintiff thereupon applied that the purchaser should be made a party to the execution-proceedings and that execution should go against him as well as against the defendant. *Held*, that no order for execution could be made. It could not go against the defendant as all his interest in the land had been sold in execution of a decree, and it could not go against the purchaser as an Injunction does not run with the land. This decision, however, was concerned with an application to enforce an Injunction against a purchaser of land for which case there is no statutory provision. It is otherwise, however, where there is a devolution on death for which contingency an express provision is made by

¹ *Pranjivandas Harjiwandas v. Mayaram Samaldas*, 1 Bom. H. C., O. C. J., 148 (1862). of a breach of injunction, *post*.
³ *Dayabhai v. Bapalal*, I. L. R., 25 Bom., 140 (1901).

² See further as to the consequences

section 234 of the Code. So in the undermentioned case,¹ the plaintiff obtained a decree against defendant, restraining the latter from obstructing the access of light and air to her windows. The plaintiff applied for execution, praying that the portion of the defendant's house which obstructed her windows should be pulled down. While this application was pending the defendant died, and his son and heir (the appellant) was brought on the record. The lower Courts directed that the decree should be executed as prayed for and directed the appellant (the son and heir of the deceased defendant) to pull down the obstructing portion of the house in question within a given time, and in case of failing to do so, empowered an officer of the Court to have it pulled down. On second appeal to the High Court it was contended (1) that as the judgment-debtor had died after the commencement of the proceedings, a fresh application should have been made, instead of continuing the *darkhast* issued against him, against his son (the present appellant), and that no notice had been issued under section 248 of the Civil Procedure Code (XIV of 1882); (2) that the lower Courts should have made their orders under section 260 of the Civil Procedure Code (XIV of 1882); and (3) that the original defendant having died, the Injunction could not be enforced against his son (the appellant) as an Injunction does not run with the land. *Held*, as to the first objection, that as it was not raised in the lower Courts, it could not be entertained on second appeal. As to the second objection, *held* that the order passed by the lower Courts was wrong. Their order should have been made under section 260 of the Code of Civil Procedure (XIV of 1882). The application for execution was not in proper form, but the High

¹ *Sakarial v. Bai Parvatibai*, I. L. R., 26 Bom., 283 (1901).

Court allowed it to be amended. As to the third objection, *held* that having regard to the provisions of section 234 of the Civil Procedure Code, 1882, the Injunction ordered against the deceased defendant might be enforced against his son as his legal representative.

Effect and
operation of an
injunction.

§ 26. An Injunction operates from the date of the order being made and not from the time of the sealing of the writ or even from the time of its being drawn up; and a party who has notice of an order is bound by it from the time it is pronounced.¹ The operation and effect of a final Injunction is to perpetually inhibit the defendant from the commission of the act enjoined; and of an interlocutory Injunction to prohibit the commission of a particular act during the period mentioned in the order. An Injunction generally only protects the plaintiffs named in the record;² and persons not named in the order of Injunction are not liable to be committed for a breach, though if with notice of the Injunction they do acts in violation thereof, they may be committed for contempt.³ The violation of a subsisting Injunction, however erroneous, made with jurisdiction will render the offender liable to be committed for contempt;⁴ but a defendant who is charged with a breach may show that the order has expired.⁵ An undertaking entered into with the Court is equivalent to and will have the effect of an Injunction so far, that any infringement thereof may be made the subject of an application to the Court.⁶ It

¹ *v. post*, pp. 88, 89, and cases there cited.

² *Lund v. Blanchard*, 4 Hare, 290.

³ *Wellesley v. Mornington*, 11 Beav., 180; *Nilmadhul Mundul v. Mr. W. F. Gillander*, 2 Sevestre, 951, 954 (1863): *v. post*, p. 91.

⁴ *v. post*, p. 85.

⁵ *Daw v. Eley*, 3 Eq., 496.

⁶ *London & Birmingham Ry. Co. v. Grand Junction Canal Co.*, 1 Ry. Cas., 224, 241; *Att.-Gen. v. Manchester and Leeds Ry. Co.*, *ib.*, at p. 436; *Att.-Gen. v. Boyle*, 10 Jur. N. S., 309; *Lawford v. Spicer*, 2 Jur. N. S., 564; but the Court will not enforce an undertaking given by mistake; *Mullins v. Howell*, 11 Ch. D., 763.

is no breach of an Injunction for a person not a party to the suit, and who has not acquired a right *pendente lite* from any one as a party, to exercise a right which he had antecedently to the suit.¹ In determining whether the operation of an Injunction has been interfered with regard must be had to the terms of the Injunction itself. As an order for commitment will not be sustained, unless it can be shown that there has been a breach of the Injunction,² so if the Injunction be in general terms restraining a defendant from permitting a certain injurious effect to be produced by a given cause (but not restraining any definite act) the Court must be satisfied that the injury complained of was produced by the cause assigned.³ But the general terms of an Injunction will not be restricted by reference to the particular nature of the injury complained of, if it has been in spirit as well as in terms violated.⁴ The Court will not permit defendants to evade responsibility for violating an Injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing.⁵

An appeal from a final Injunction does not suspend its operation; nor where an interlocutory Injunction has been granted in a suit, which is ultimately dismissed, does the appeal have the effect of reviving the Injunction.⁶ An Injunction is not retroactive in effect, and a person who

¹ *Bottle v. Stanley*, 2 Eq. Ca., Ab., 528; and *Iverson v. Harris*, 7 Ves., 256. So a stranger to the cause who is unconnected with the parties defendants, will not be liable for doing the act prohibited by the injunction; *Boyd v. State*, 19 Neb., 28 (Amer.); but see also *Avory v. Andrews*, 30 W. R. (Eng.), 504.

² *Mann v. Stephens*, 15 Sim., 377;

Dawson v. Paver, 5 Hare, 424.

³ *Dawson v. Paver*, 5 Hare, 524.

⁴ *Atk.-Gen. v. Great Northern Ry. Co.*, 4 DeG. & Sm., 75.

⁵ *Gibbs v. Morgan*, 39 N. J. Eq., 79 (Amer.); and see *Loder v. Arnold*, 15 Jur., 117; *Grand Junction Canal Co. v. Dimes*, 17 Sim., 38; *v. post*, p. 89, 90.

⁶ *v. ante*, p. 74.

has been enjoined will not be held liable for contempt for the doing of any act before suit brought or Injunction granted.¹ An Injunction irregularly or erroneously issued is voidable only, but an Injunction granted by a Court without jurisdiction is wholly void.² An Injunction, however regularly issued, has no effect in altering the right of property.³ So where an Injunction was issued against a person prohibiting her from parting with a *taluk* in which she had a beneficial interest until the further orders of the Court, but she subsequently and during the continuance of the Injunction executed a *putni* and *ijarah* of the property, it was held that the *putni* and *ijarah* were not void by reason of their having been made *pendente lite* or otherwise, but were operative as against herself and to the extent of binding all the interest she possessed in the property. As against all the world they passed the legal estate in the property, though the grantees taking no greater interest than she had, or might have, held it subject to the rights and equities of the parties to the suit in which the property was in dispute and in which the Injunction was made. The property in such a case is not *in custodia legis* as it would be, if attached and placed in the possession of a Receiver.⁴ The Code in providing a specific penalty for the breach of an Injunction,⁵ does not provide that one of the penalties which result from the infringement of an Injunction, is that any dealing with property, the subject of such an Injunction, contrary to the terms of the Injunction, is illegal and void.⁶

¹ *People v. Albany & V. R. Co.*
12 Ab. Pr., 171; *Witter v. Lyon*, 34
Wis., 564 (Amer.); High, Inj., § 1447.

² *v. post*, p. 85.

³ *Nilmadhul Mundul v. Mr. W. F.*
Gillander, 2 Sevestre, 951, 955 (1863).

⁴ *Nilmadhul Mundul v. M. W.*
Gillander, 2 Sevestre, 951, 955 (1863).

⁵ Civ. Pr. Code, s. 493.

⁶ *The Delhi and London Bank v*
Ram Narain, I. L. R., 9 All., 497,
499 (1887).

§ 27. The granting of Injunctions being justly regarded as one of the highest prerogatives of Courts of Equity, the most exact and implicit obedience is required from those against whom the mandate of the Court is directed. With whatever irregularities the proceedings may be effected, or however erroneously the Court may have acted in granting the Injunction in the first instance, it must be implicitly obeyed as long as it remains in existence, and the fact that it has been granted erroneously affords no justification or excuse for its violation before it has been properly dissolved.¹ Upon proceedings for contempt the only legitimate enquiry is whether the Court granting the Injunction had jurisdiction of the parties and of the subject-matter, and whether it made the order which has been violated, and the Court will not in such proceedings consider whether the order was erroneous. The reason for the rule is found in the necessity of preserving the respect and obedience due to the mandates of equity, and of preventing the disastrous confusion which would inevitably result from allowing parties against whom Injunctions were issued to be themselves the judges of the propriety of the relief, or of the regularity of the proceedings. From the nature of the case the tribunal granting the relief must itself be the arbiter, and its commands are to be strictly observed, until properly revoked. And if the Court granting the relief had jurisdiction of the subject-matter, the fact that its power was erroneously exercised does not render the Injunction void but only voidable, and until it is set aside or revoked it is entitled to implicit obedience.² But

Breach of an
Injunction.

¹ High, Inj., § 1416; Joyce, Inj., 1323; *Harding v. Tingey*, 12 W. R. (Eng.), 684; *Spokes v. Banbury Board of Health*, 1 Eq., 42; *Woodward v. Earl of Lincoln*, 3 Sw., 626; *Russell v. Anglian Railway Co.*, 3 Mac. & G., 104, 117; *Partington v. Booth*, 3 Meriv., 148.

² High, Inj., §§ 1416, 1417. An Injunction, however erroneously granted

while obedience is thus required the rule is to be understood with the qualification that the Court has jurisdiction over the subject-matter in controversy. For if the Court has no jurisdiction over the matter involved, or if it has exceeded its powers by granting an Injunction in a matter beyond its jurisdiction, its Injunction will be treated as absolutely void, and defendants cannot, in such case, be punished for contempt for its alleged violation.¹

The violation of an Injunction constitutes a contempt of the Court from which it issued and will be punished accordingly. The High Courts in India have the same powers in the matter of contempt as the Courts in England.² According to English practice if there be a breach, an order for committal is obtained on motion, and generally notice of the motion must have been duly served personally on the party who has committed the contempt.³ The motion to commit must be supported by affidavits, proving the due service of the notice of motion or order *nisi*, that the party had notice of the Injunction and that he has committed a breach of it. The affidavits in support of the application must specify the particular acts constituting the breach, and a general

or irregularly obtained, is an order of Court and must be obeyed; *Woodward v. King*, 2 Ch. Ca., 203; *Partington v. Booth*, 3 Meriv., 149; *Woodward v. Earl of Lincoln*, *supra*; *Marquis of Downshire v. Lady Sandys*, 6 Ves., 109. The order must be discharged before it can be disobeyed. When there is an irregularity the proper course is to move at once that the order may be discharged. *Robinson v. Lord Byron*, 2 Dick., 703; *Woodward v. King*, *ib.*, at p. 797, and *See* cases cited in *Joyce's Inj.*, 1323, 1324. As to the form of notice of motion to

discharge, *See* Dan. Ch. Pr., vol. III, Nos. 53, 1679.

¹ *Walton v. Develing*, 61, Ill. 201 (Amer.); *Dart v. The People*, 62, Ill. 306; *Andrews v. Knox Co.*, 70, Ill. 65; *Dickey v. Reed*, 78, Ill. 261, cited in *High. Inj.*, § 425.

² *Vide ante*, p. 75, and cases there cited. As to the provisions of the Civil Procedure Code, *See* s. 493, and *ante*, p. 76.

³ As to *ex parte* orders, *see Duran v. Toore*, 2 R. & M., 33; *Lechmere Charlton's case*, 2 M. & C., 316; *Ex parte Clarke*, 1 R. & M., 563.

allegation that the defendant has violated the order is not sufficient. If, on the hearing of the motion to commit, the fact of a breach is disputed, a trial of the question of fact will, if necessary, be directed. If, upon hearing the motion, the Court is of opinion that the party is guilty of a breach of Injunction, the Court will commit him to prison, or if the breach is not wilful or contemptuous, or if the defendant has endeavoured to set himself right, or if the defendant is blameless, the contempt having been committed by a servant or agent employed by him, or by his wife,¹ or if the defendant expresses regret for what he has done, the Court is generally satisfied by merely making him pay the costs of the application of bringing the breach under its notice.² If the party guilty of a breach of Injunction is a corporate body,³ or a company, or a person against whom process of contempt cannot issue, whether from his being out of the jurisdiction,⁴ or otherwise,⁵ the proper course is to move that a writ of sequestration shall issue to sequester the personal estate, and the rents, issues and profits of the real estates of the defendants, until the further order of the Court.⁶

¹ *Rantzen v. Rothschild*, 14 W. R. (Eng.), 96; *Ex parte Langley*, 13 Ch. D., 121; *Hope v. Carnegie*, 7 Eq., 254. It is of course the clear duty of a person enjoined to restrain his employees; and if he permits the act to be done by them through negligence and inattention, he is in contempt: *Poertner v. Russell*, 33 Wis., 193 (Amer.).

² *Joyce's Inj.*, 1334-1339; *Kerr, Inj.*, 640-649. Nor will the Court in general make the order for commitment, if not pressed to do so. See *In re Byrant*, L. R., 4 Ch. D.,

98, 100.

³ *Att.-Gen. v. Great Northern Railway Co.*, 4 DeG. & Sm., 75; *Spokes v. Banbury Board of Health*, L. R., 1 Eq., 42; 14 W. R. (Eng.), 128; *Selous v. Croydon Board of Health*, W. N. (1885), 105. See *East India Company v. Kynaston*, 3 Bli., 153, 163.

⁴ *Re East of England Bank*, 2 Dr. & Sm., 284.

⁵ See *Storer v. Great Western Railway Co.*, 1 Y. & C. Ch. Ca., 180; 11 L. J. (N. S.), 67.

⁶ See for the form of the order, *Joyce, Inj.*, 1339; 1 Set., 296.

An application to commit for violation of an order for an Injunction is a matter *strictissimi juris*.¹ And therefore when proceedings are instituted to punish a defendant for breach of an Injunction the fact of his guilt must be clearly and explicitly established to the satisfaction of the Court.² The breach of an Injunction being in the nature of a tort it is no objection that the plaintiff has moved to commit one of the defendants only.³

An Injunction operates from the date of the order being made and not from the time of the sealing of the writ or even from the time of its being drawn up.⁴ A party may be committed for the disobedience of an order of Injunction between the date of the making of the order and that of its issue, the reason being that if the rule were otherwise the party against whom the order was made would have all that time during which he might defeat the order of the Court by doing the act which the Injunction is intended to restrain. But the rule is not intended to excuse improper delay in getting the order drawn up and served, much less a total failure to get the order issued. So where, in May 1855, an order of Injunction was drawn up and served on the attorney of the defendant, but no writ of Injunction was ever issued in pursuance of it, it was held in a suit brought in 1862 that it was very doubtful whether the plaintiff in the original suit in which the Injunction was made could ever have obtained an order for the commitment of the defendant for breach of

¹ *Harding v. Tingey*, 12 W. R. (Eng.), 685.

² *Mann v. Stephens*, 15 Sim., 377; the proceedings for contempt are quasi-criminal: *Worcester v. Truman*, 1 McLean, 483; High. Inj., §§ 1449, 1454. See, however, also *O'Shea v. O'Shea* and *Parnell*, L. R., 16 P. D., 59, 62.

³ *Newman v. Ring*, 10 Jur., 463; 5 L. J. Ch. (N. S.), 365.

⁴ *Rathray v. Bishop*, 3 Madd., 220; *Osborne v. Tenant*, 14 Ves., 136; *James v. Downes*, 18 Ves., 522; *Vansandau v. Rose*, 2 J. & W., 264; *Kempton v. Eve*, 2 Ves. & B., 149; *Goosh v. Morshall*, 8 W. R. (Eng.), 410.

the Injunction.¹ And that if this argument was of any weight as between the parties to a suit it applied *à fortiori* in the case of third parties, whom it is sought to affect by the Injunction.² A party who has notice of an order is bound by it from the time it is pronounced.³ Any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined is sufficient; and it is not requisite that a defendant against whom an Injunction has issued, should be officially apprised of its existence or be served with process in the cause to render him liable for contempt, in committing a breach of the Injunction. Violation of the Injunction will constitute a contempt, if the purport and effect are verbally explained to the defendant,⁴ or if he be served with a written notice and admits his belief that the order was made,⁵ or if he remain in Court during the argument of a motion, though he leave it just before the order is made, knowing from what has passed that it will be so made,⁶ or if, though not officially apprised of the issue, he has been informed of it by one of the parties to the suit,⁷ or if he receive notice by telegraph of the granting of an Injunction.⁸ If a party has by himself or his attorney notice in any other way of

¹ *Nimadhub Mundul v. Mr. W. F. Gillander*, 2 Sevestre, 951, 954 (1863), citing *Vansandan v. Rose*, 2 Jacob & Walker, 264; *James v. Downes*, 18 Ves., 522.

² *Ib.*

³ *M'Neill v. Garratt, Cr. & Ph.*, 99. If the matter be pressing, actual service of the order will be dispensed with, and service of a copy of the minutes of an order or of a notice of its having been obtained, will be sufficient: *Kerr, Inj.*, 641, 630; but even the latter, will be unnecessary in order to secure a committal, if it can be shown that the defendant had actual notice of the order: *v. cases*

cited, *post*.

⁴ *Vansandan v. Rose*, 2 Jac. & W., 264; and See *Goosh v. Marshall*, 8 W. R. (Eng.), 410.

⁵ *Kempton v. Eve*, 2 Ves. & B., 349, and even though he claims to have acted under the advice of counsel, *ib.* See p. 92, note (1).

⁶ *Osborn v. Tennant*, 14 Ves., 136.

⁷ *Hall v. Thomas*, 3 Edw. Ch., 236.

⁸ *In re Bryant*, L. R., 4 Ch. D., 98; *Ex parte Langley*, L. R., 13 Ch. D., 110. But the presence of defendant's counsel in Court without instructions is not notice to the defendants; *Carrow v. Ferrier*, 37 L. J. Ch., 569.

the issue, even though it be not a regular notice, it is a breach of the Injunction to disobey it; but there should be no delay in the drawing up of the order.¹ But the Court will not punish unless it be clear that the party alleged to be in contempt knew that the Injunction had been issued.²

In determining whether an Injunction has been violated regard must be had to the terms of the Injunction itself.³ In deciding whether there has been an actual breach of an Injunction, it is important to observe the objects for which the relief was granted as well as the circumstances attending it.⁴ Moreover, the violation of the spirit of an Injunction even though its strict letter may not have been disregarded is a breach of the mandate of the Court.⁵ On the other hand, when the conduct complained of, although literally a breach of the Injunction, is not so in spirit, and where defendants have acted in good faith, and there is no evidence of any intention on their part to violate the order, they will not be held guilty of contempt.⁶ An intention to violate an Injunction is immaterial, unless the breach be actually carried into effect.⁷ It has been held that, if a complainant, at whose instance an Injunction has been granted, himself consents to its violation, he is estopped from afterwards having the defendant punished for such violation.⁸ The conduct of the party obtaining the Injunction, as well as the motive of

¹ *Joyce, Inj.*, 1325; *Laues v. Morgan*, 5 Price, 518; *Powell v. Follet*, Dick., 116; *James v. Downes*, 18 Ves., 522; *Bateman v. Wiatt*, 11 Beav., 587.

² *Carrow v. Ferrier*, supra.

³ *v. ante*, p. 83.

⁴ *Loder v. Arnold*, 15 Jur., 117.

⁵ *Grand Junction Canal Co. v. Dimes*, 17 Sim., 38.

⁶ *Fraas v. Barlement*, 10 C. E. Green, 84 (Amer.) the defendant will not be committed for some trifling thing not causing real mischief: *Baxter v. Bower*, 44 L. J. Ch., 626.

⁷ *Grand Junction Canal Co. v. Dimes*, 18 L. J. Ch., 419.

⁸ *Howard v. Durand*, 36 Ga., 346 (Amer.).

the defendant in violating it, may properly be taken into account in determining defendant's liability for the breach.¹ But to deprive a party obtaining the order of the right to move for a committal for its breach, on the ground of his acquiescence therein, the defendant must show such a degree of acquiescence as would suffice to create a new right in himself.²

Only the person against whom an Injunction is issued may be committed for its breach, but a person who, with knowledge of an Injunction against a particular person, aids and assists that person to commit a breach of the Injunction, may himself be committed for contempt though not for breach of the Injunction.³ A man may be guilty of a breach of an Injunction by aiding and abetting those who are committing an act inconsistent with it, although he should not actually take part in such act.⁴ And there may be a contempt by assisting in the official act of a person acting under lawful authority.⁵ It is no answer for a defendant to say he has acted under advice. So, if an Injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the Injunction has been infringed an attachment will issue, even though the defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the Injunction. The Court in such cases does not necessarily consider itself bound by the opinion of

¹ *Mills v. Cobby*, 1 Meriv., 3; *Barfield v. Nicholson*, 2 L. J. Ch., 90; *United Telephone Co. v. Dale*, 25 Ch. D., 778; as to delay, See *St. John's College v. Carter*, 8 Jur., 1036.

² *Rodgers v. Nowill*, 3 DeG. M. & G., 614, per Turner, L. J.

³ *Nilmadhab Mundul v. Mr. W.*

F. Gillander, 2 Sevestre, 951, 954 (1863); *Lord Wellesley v. The Earl of Mornington*, 11 Beav., 180, 181; See *Joyce, Inj.*, 1327.

⁴ *St. John's College v. Carter*, 8 L. J., 218; 4 My. & Cr., 497.

⁵ *Woodward v. Earl of Lincoln*, 3 Sw., 626.

surveyors, but will form its own judgment as to the probable effect of the structure complained of.¹

In the case last cited attachment was ordered to issue ; but at the suggestion and by the consent of the plaintiff, the suit was ordered to be in the office for a fortnight before being executed, in order to afford the defendants time to propose terms of arrangement.

Compensation
to defendant
for issue of
injunction on
insufficient
grounds.

§ 28 If it appears to the Court that an Injunction which it has granted was applied for on insufficient grounds, or if, after the issue of the Injunction, the suit is dismissed or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the Injunction : Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation. An award under this section shall bar any suit for compensation in respect of the issue of the Injunction.²

The provisions of this section show that when a claim is dismissed an Injunction cannot subsist pending an appeal or until the period for lodging an appeal has elapsed ; for, if such were the case, the Court would not have had authority given it to grant compensation.³ Section 497 allows by implication the power of bringing a suit for

¹ *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. H. C. R., O. C. J., 148 (1863).

² Civ. Pr. Code, s. 497 : applies to H. C. : corresponds with s. 96 of Act VIII of 1859.

³ *Shaikh Moheesooddeen v. Shaikh*

Ahmed Hossein, 14 W. R., 384 (1870) : See *Ram Chand v. Pitam Mal*, I. L. R., 10 All., 506, 512 (1888) ; *Yaminud-Dowlah v. Ahmed Ali Khan*, I. L. R., 21 Cal., 561, 563 (1894) ; and *ante*, p. 66.

damages where it recites that no one who has already obtained an award of compensation under the section shall be entitled to sue separately for damages, thus clearly leaving that remedy to those who do not wish to take advantage of the remedy given them by the Code. It is easy to conceive of cases in which the compensation awardable under that section would be altogether insufficient; for the utmost that can be granted is Rs. 1,000.¹ Where an application has been made and an award of compensation has been granted under this section the provisions of the latter bar any separate suit for compensation in respect of the issue of the Injunction. The corresponding section of Act VIII of 1859 concluded with the words "an award of compensation under this section shall bar any suit for damages in respect of the issue of the injunction." And it was held thereunder that as that section provided expressly that only an award of compensation should debar a suit for damages, it followed that an *unsuccessful* application by the defendant would not debar him from instituting a suit for the purpose of obtaining such compensation.² And under the present section the denial of compensation would not be an "award."³

If a plaintiff brings a suit or makes an application, maliciously, or without probable or reasonable cause to a Court of competent jurisdiction to seize property of another person as the property of his judgment-debtor, he may be liable for damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable in damages for applying

Mr. Edward Wilson v. Kanhya Sahoo, 11 W. R., 143 (1869).

² *Nanda Kumar Shaha v. Gour*

Sankar, 5 B. L. R., App. 4 (1870): s. c., 13 W. R., 305.

³ O'Kinealy's Civ. Pr. Code, 453.

for an Injunction upon grounds which he knows to be insufficient.¹

A suit for compensation for injury caused by an Injunction must be brought within three years from the date when the Injunction ceases.² The time of the accrual of the cause of action is the time at which the plaintiff is damaged by the wrongful Injunction obtained by the defendant, and the cause of action continues as long as the Injunction remains in force; but as soon as the Injunction is at an end limitation begins to run.³ In such a suit it was held that where special damage is the gist of a plaintiff's case and he fails to prove such damage he is precluded from recovering ordinary damages.⁴

¹ *Joykalee Dasse v. Chandmalla*, 9 W. R., 133, 135 (1868).

² Act XV of 1877 (Limitation), Art. 42.

³ *Nanda Kumar Shaha v. Gour*

Sankar, 5 B. L. R., App. 4, 6 (1870) s. C., 13 W. R., 305.

⁴ *Mr. Edward Wilson v. Kankya Sahoo*, 11 W. R., 143, 144 (1869).

CHAPTER II.

INJUNCTIONS GENERALLY.

29. GENERAL RULES GOVERNING
THE GRANT OF RELIEF BY
INJUNCTION.

— § 30. TEMPORARY INJUNCTIONS—

- (i) The applicant must show a fair *prima facie* case in support of the right claimed ;
- (ii) and an actual or threatened violation of that right ;
- (iii) productive of irreparable or at least serious damage ;
Anantnath Dey v. Mackintosh.
- (iv) His conduct must be such as not to disentitle him to assistance—
 - (a) it should be fair and honest, //2.
 - (b) and in particular there must be no acquiescence,
 - (c) or delay ;
- (v) There must be a greater convenience in granting than in

- refusing the Injunction ;
- (vi) and equally efficacious relief must not be obtainable by any other usual remedy except in case of breach of trust.

§ 31. PERPETUAL INJUNCTIONS. —

§ 32. MANDATORY INJUNCTIONS.

§ 33. RELIEF WHICH MAY BE GIVEN
IN A SUIT FOR AN INJUNCTION—

- (i) An Injunction ;
- (ii) Damages—
 - (a) if the plaintiff be held entitled to damages they must be given,
 - (b) assessment of and enquiry into damages ;
- (iii) Combination of damages and Injunction.

§ 34. IF RELIEF BE GIVEN IT MUST
BE OF ONE OR OTHER OF THE
PRECEDING KINDS.

§ 29. Though the exercise of the jurisdiction to grant relief by the issue of an Injunction is a matter which is purely within the discretion of the Court,¹ and the latter is not bound to grant such relief merely because it is lawful to do so, yet that discretion is not arbitrary, but sound and reasonable and guided by certain fixed judicial principles.² As an Injunction is not to be arbitrarily refused where a proper case for its issue is made out, so it is not to

General rules governing the grant of relief by Injunction.

¹ Act I of 1877, s. 52.

² v. *ante*, pp. 19, 20.

be granted merely on the ground that it can do no harm.¹ The remedy by Injunction is no doubt a useful, but it is at the same time a very strong, remedy and one not ordinarily granted where any other remedy is fairly open to the applicant or where the conduct of the parties has been such as to make it a harsh remedy to give in a particular case.²

The power which the Court possesses of granting Injunctions whether interlocutory or perpetual (however salutary) should be very cautiously exercised, and only upon clear and satisfactory grounds, otherwise it may work the greatest injustice.³ An application for an Injunction is an appeal to the extraordinary power of the Court, and the plaintiff is bound to make out a case showing a clear necessity for its exercise; it being the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones.⁴ Moreover a temporary Injunction is a restrictive or prohibitory process designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the Courts be determined. As such, an Injunction is in its operation somewhat like judgment and execution before trial; it is only to be resorted to from a pressing necessity, to avoid injurious consequences which cannot be repaired under any standard of compensation.⁵

With such modifications as arise from the fact that an Injunction is claimed before or at the conclusion of the hearing of the right, the general principles upon which temporary and perpetual Injunctions are granted are the same.

¹ *Dunn v. Bryan*, 7 Ir. R., Eq., 143.

² *Noyne Misser v. Rupikun*, 12 C. L. R., 300 s. c., 1. L. R., 9 Cal., 609, 611 (1882).

³ *Ware v. Regent's Canal Company*,

3 DeG. & J., 231, per Lord Chelmsford, L. C.; v. ante, p. 62.

⁴ *Hilliard, Inj.*, § 16.

⁵ *Spelling's Extraordinary Relief*

§ 21.]

In the case of temporary Injunctions : (1) The applicant must show a fair *prima facie* case in support of the right claimed ; and (2) an actual or threatened violation of that right ; (3) productive of irreparable or at least serious damage ; (4) his conduct must be such as not to disentitle him to assistance: it should be fair and honest, and in particular there must be no acquiescence or delay ; (5) there must be a greater convenience in granting than refusing the Injunction ; and lastly (6) equally efficacious relief must not be obtainable by any other usual mode of proceeding, except in case of breach of trust. With the exception of the first, all of the above conditions apply to perpetual Injunctions. In the place of the excepted condition, it is required that the legal right must be *established* before a decree for an Injunction, can be made. Upon the grant of perpetual Injunctions, further questions arise as to the taking of accounts and the payment of costs.

§ 30. The subject-matter of a temporary Injunction is the protection of legal rights *pending litigation*. Its object is to prevent future injury, leaving matters as far as possible *in statu quo* until the suit in all its bearings can be heard and determined.¹ In exercising its jurisdiction to protect legal rights to property from irreparable or serious damage pending the trial of the legal right, the Court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established.² The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection

Temporary
Injunctions.

¹ *Stephens v. The Trustees of the Port of Bombay*, 1 L. R., 1 Bom., 146 (1876).

² *Harman v. Jones, Cr. & Ph.*, 299, 301 : Kerr, Inj., 11.

of that right, or of the property in question, until the legal right can be ascertained.¹

The Court upon an application for a temporary Injunction will deal with the Injunction upon the evidence before it, and will confine itself strictly to the immediate object sought, and as far as possible abstain from prejudging the question in the cause.²

(i) The applicant must show a fair *prima facie* case in support of the right claimed.

An Injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant³ who must have a personal interest in the matter.⁴ In the first place, therefore, as interference by Injunction is founded on the existence of a legal right (see § 15, *ante*) an applicant must be able to show a fair *prima facie* case in support of the title which he asserts.⁵ Being a severe remedy an Injunction will not be granted in the first instance except upon a clear *prima facie* case and upon positive averments of the equities on which the application for the relief is based. The complainant must allege positively the facts constituting his grounds for relief, although it is not essential that he should establish his case, upon an application for an interlocutory Injunction, with the same degree of certainty that would be required upon the final hearing. Mere argumentative allegations or inferences from the facts stated do not suffice to meet the requirements of the rule requiring allegations to be specific, and the relief will not ordinarily be allowed where the facts upon which

¹ *Harman v. Jones*, Cr. & Ph., 299, 301; *Kerr, Inj.*, 11.

² *Gopeenath Mookerjee v. Kally Doss Mullick*, I. L. R., 10 Cal., 225, 231 (1883); *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 466 (1895); *Kerr, Inj.*, 24; *Moran v. River Steam Navigation Company*, 14 B. L. R., 357 (1875).

³ Act I of 1877, ss. 54, 3.

⁴ *Ib.*, s. 56, cl. (k).

⁵ *Saunders v. Smith*, 3 M. & C., 714, 728; *Hilton v. Lord Granville*, Cr. & Ph., 283, 292; *Kerr, Inj.*, 11; *Joyce's Doctrines*, 27. A clear right free from reasonable doubt must be satisfactorily shown. *Hilliard, Inj.*, § 16.

the complainant's equities rest, are stated only upon information and belief.¹ Upon an application for an interlocutory Injunction, the Court will not, however, decide which of the parties is right in their statement of facts. Looking at all the facts of the case it will consider whether it is right that the applicant should suffer the alleged threatened injury whilst his rights are being investigated. Of course, if he has no rights, *cadit questio*.² But if his statement of facts is true and raises a fair and substantial question to be decided as to what the rights of the parties are, then the Court will issue the Injunction,³ though in doing so it will not assume that he has the right which he claims, nor that the defendant is justified in saying that that right does not exist.⁴ An applicant is not required to make out a clear legal title, but to satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent.⁵ The Court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit.⁶ The mere existence

* The question falls; there is no further discussion.

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¹ Spelling's Extraordinary Relief, § 25; v. ib., § 20; Hilliard, Inj., §§ 45, 52. Thus it is well established that the mere allegation of irreparable injury will not be sufficient, but the facts must appear on which the allegation is predicated in order that the Court may be satisfied as to the nature of the injury. *Branch v. Supervisors*, 13 Cal., 190 (Amer.); High, Inj., §§ 34, 35.

² *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 357 (1875), per Markby, J.; *Gomes v. Car-*

ter, 1 Ind. Jur. N. S., 411, 412 (1866).

³ *Moran v. River Steam Navigation Company*, supra.

⁴ *Chandidat Jha v. Padmanand Singh Bahadur*, 1 L. R., 22 Cal., 469, 464, 465 (1895); *Shrewsbury and Chester Railway Company v. Shrewsbury and Birmingham Railway Company*, 1 Sim., N. S., 410, 426.

⁵ *Sparrow v. Oxford, Worcester, and Wolverhampton Railway Company*, 9 Ha., 436, 441; Kerr, Inj., 11, 12.

⁶ *Kerr, Inj.*, 12; *Atty.-Gen. v. Mayor of Wigan*, 5 D. M. & G., 52.

of doubt, however, is in itself insufficient to prevent the Court from granting an Injunction. The circumstance of the legal right being in doubt is a matter for serious attention ; but does not render it incumbent on the Court to refuse an Injunction. The Court must be guided by a discretion according to the exigencies and the nature of each particular controversy.¹ The Court must in this as in other matters proceed upon probabilities ; nor is a contradiction upon the facts in itself a bar to the issue of an interim Injunction. In a large number of cases interim Injunctions issue simply in order to keep parties *in statu quo* while these rights are being determined and there is generally a conflict upon the facts out of which these rights arise.² A probability of right is sufficient to sustain an Injunction.³ The Court will, in many cases, interfere to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided, and that, without expressing, and often without having the means of forming, any opinion as to such rights ; it is true the Court will not interfere if it thinks that there is no real question between the parties, but if it sees that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of ; and in order to support an Injunction for such purpose it is not necessary for the Court to decide upon the merits in favour of the plaintiff ; if the plaintiff states a substantial question between the parties, the title to the Injunction may be good, although the title to the relief prayed may ultimately fail.⁴

¹ *Ollendorf v. Black*, 4 DeG. & S., 209, 211.

² *Per* Markby, J., in *Moran v. River Steam Navigation Company*, 14 B. L. R., 357 (1875). But when the plaintiff's moving allegations are denied in such a manner as to leave

their truth in serious doubt, the application for an Injunction will be in general denied. *Beach, Inj.*, § 20.

³ *Tonson v. Walker*, 3 Sw., 679.

⁴ *Great Western Railway Co. v. Birmingham and Oxford Junction*

*Court preserve
property in statu
quo. 46 Cal 1001*

Upon the question of proof of title a clear distinction must be drawn between applications for an Injunction and for a Receiver. In the former case, it is sufficient if it be shown that the plaintiff has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out.¹

The right to relief by Injunction is not excluded by the fact that a penalty has been imposed by Statute securing that right;² nor, in suits on contracts, because the contract provides for a penalty for its non-performance.³

Assuming that the applicant has shown a fair and substantial *prima facie* case to be tried as to the existence of the legal right, or assuming that the right is not disputed, but the fact of its violation is denied, the plaintiff must further establish that there is an actual or threatened violation of that right. To entitle a person to an interlocutory Injunction, it is not necessary that a wrong should have been already committed. A Court of Equity will not require that which would in most cases defeat the very purpose for which the relief is sought by allowing the commission of the act which it is sought to restrain. Satisfactory proof that the defendant threatens the commission of a wrong, which it is within the power

(ii) and an actual or threatened violation of that right:

Railway Co., 2 Phill., 597; *Joyce's Doctrines*, 29.

¹ *Chandidat Jha v. Padmanand Singh Bahadur*, 1 L. R., 22 Cal., 459, 464, 465 (1895), citing *Kerr, Rec.*, 3, 4; *Kerr, Inj.*, 10, 11.

² *Haywood v. East London Waterworks Company*, 28 Ch. D., 139, 146.

³ *Madras Railway Company v. Rast*, 1 L. R., 14 All., 18, 22 (1890).

⁴ *Kerr, Inj.*, 12; *Ripon v. Hobart*, 3 M. & K., 169, 176; *Tipping v. Eckersley*, 2 K. & J., 284; *Imperial Gas Company v. Broadbent*, 7 H. L., 600; *Benode Coomaree Dossee v. Souda-*

miney Dossee, 1 L. R., 16 Cal., 257 (1889).

⁵ *Ib.*; *Bindu Basini Chowdhurani v. Jahnavi Chowdhurani*, 1 L. R., 24 Cal., 260 (1896); *Kalidas Jivram v. Gor Paijaram Hirji*, 1 L. R., 15 Bom., 309 (1890); see Act I of 1877, s. 54 ["invades or threatens to invade"]. *Atty.-Gen. v. Forbes*, 2 M. & C., 123, 132; *Hext v. Gill*, 7 Ch., 700; *Tipping v. Eckersley*, *supra*; *Cooper v. Whittingham*, 15 Ch. D., 501; *Atty.-Gen. v. Acton Local Board*, 22 Ch. D., 221; *Shafte v. Bolckow, etc., Co.*, 56 L. J., Ch., 735.

of the Court to prevent, constitutes a sufficient ground to justify interference.¹ There is some conflict of views as to what imminency of irreparable injury must be shown to entitle a party to an Injunction, as well as to the true meaning of the term. An Injunction is never granted except for substantial reasons founded on actual interest.² An Injunction is not justified by the fact that, if there be no intention on the part of the defendant to do the acts feared, the Injunction can do no harm.³ The evidence must show a probability of the defendant doing the act which it is sought to restrain.⁴ To warrant the Court in granting or continuing an Injunction, it must be reasonably satisfied that there is an intention on the part of the defendant to do the acts sought to be restrained, or, at least, that there is probable ground for believing that, unless the injunction is granted, there is danger of such acts being done.⁵ A plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say that a violation of the right may be the result; the plaintiff must show that a violation will be the inevitable result.⁶

Where a threatened act is such that injury will inevitably follow, a Court may grant a perpetual Injunction restraining the continuance of that act even though no damage has actually accrued before institution of suit;

¹ Spelling's Extraordinary Relief, § 18; High, Inj., § 18.

² *Ib.*; as to interest, see Act I of 1877, s. 56, cl. (k).

³ *Dunn v. Bryan*, 7 Ir. R., Eq., 143.

⁴ *Cowley v. Byas*, 5 Ch. D., 944.

⁵ *Dunn v. Bryan*, *supra*.

⁶ *Pattison v. Gifford*, L. R., 18 Eq., 256, 263; followed in *Bindu Basin*

Chowdhurani v. Jaknabi Chowdhurani L. L. R., 24 Cal., 260 (1896); see also *Haines v. Taylor*, 10 Beav., 471 *Goodhart v. Hyett*, 25 Ch. D., 190. A mere possibility, or anything short of a reasonable probability of injury, is insufficient to warrant an injunction; *Lorenz v. Waldron*, 96 Cal., 243 (Amer.), cited in *Beach, Inj.*, § 17.

and where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury. The term "inevitably" is used not in the sense of there being no possibility the other way, but in the sense that there must be such great probability, that, in the view of ordinary men using ordinary sense, the injury would follow.¹

It is not sufficient that the complainant apprehends or fears the commission of prejudicial acts by the defendant, since there may, in fact, be no substantial grounds therefor; facts establishing the probability of the commission of such acts, unless defendant be restrained, are necessary.² The rule upon this point has been summarised as follows³ :—

"The mere *prospect* or *apprehension* of injury, or the mere belief that the act complained of may or will be done, is not sufficient;⁴ but if an *intention* to do the act complained of can be shown to exist, or if a man *insists* on his right to do, or *begins* to do, or *threatens* to do, or *gives notice* of his intention to do, an act which must, in the opinion of the Court, if completed, give a ground of action, there is a foundation for the exercise of the jurisdiction.⁵ The mere denial by a man of his intention to do an act or to infringe a right will not prevent the Court from interfering;⁶ but if a man asserts positively that it is not his intention to do a certain act or to infringe a certain right, and there is no evidence to show any intention on his

¹ *Bindu Basini Chowdhani v. Jahnabi Chowdhani*, 1. L. R., 24 Cal., 280, 284 (1896).

² Spelling's Extraordinary Relief, § 18.

³ Kerr, Inj., 12, 13.

⁴ *Ripon v. Hobart*, 3 M. & K., 174;

Haines v. Taylor, 10 Beav., 75; *Chabildas v. Municipal Commissioner of Bombay*, 8 Bom. H. C. R., 85 (1871).

⁵ See English cases cited *ante*, p. 102.

⁶ *Jackson v. Cator*, 5 Ves., 688; *Potts v. Levy*, 2 Drew, 272; *Adair v. Young*, 12 Ch. D., 10.

part to do the act or infringe the right,¹ the Court will not interfere.² Nor will the Court interfere if a man who claims a right to do a certain act asserts positively that before proceeding to do the act, he will give notice of his intention to do it; and there is no reason to doubt the truth of his assurance.³

Moreover, in all cases it is to be remembered that in the exercise of the discretion given to it by the Specific Relief Act, the Court will consider not merely whether the plaintiff's right has been infringed, or even materially infringed, but also whether, under all the circumstances of the case, he ought to be granted an Injunction as the proper and appropriate remedy for such infringement.⁴ When an injury has already been committed, and is not alleged to be *continuing*, there is no ground for an Injunction.⁵ The appropriate function of the writ is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. It is not therefore an appropriate remedy to procure relief for past injuries. If the act sought to be enjoined has already been committed, the Court will not interfere since the granting of an Injunction under such circumstances would be a useless act.⁶

(iii) productive of irreparable or at least serious damage.

A person who sought the aid of a Court of Equity was required to satisfy the Court that its interference was necessary to protect him from irreparable, or at least serious, injury before the legal right could be established

¹ See *Kristna Ayyan v. Vencatachella Mudali*, 7 Mad. H. C. R., 60, 71 (1872).

² *Fooks v. Wills, Somerset and Weymouth Railway Co.*, 5 Ha., 199; *Woodman v. Robinson*, 2 Sim. N. S., 204; *Kernot v. Potter*, 3 D. F. & J., 447, 457.

³ *Cowley v. Byas*, 5 Ch. D., 950.

⁴ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, 1. L. R., 18 Bom., 488 (1894).

⁵ *Coker v. Simpson*, 7 Cal., 340 (Amer.), cited in *Hilliard, Inj.*, § 14.

⁶ *High, Inj.*, § 23; *Beach, Inj.*, § 41.

at the trial.¹ In its general sense an "irreparable injury" is one which cannot be repaired by any means accessible to individual parties or by invoking the aid of others. In its technical sense, as used in connection with the question of granting or withholding preventive equitable aid, an injury is said to be "irreparable" either because no legal remedy furnishes full compensation or adequate redress, owing to the inherent ineffectiveness of such legal remedy, or because owing to the delay incident to the prosecution of an action at law to final judgment and obtaining service therein, such judgment and process would prove fruitless of beneficial results.² By the term "it is not meant that there must be no physical possibility of repairing the injury; all that is meant is that the injury be a serious one, or at least a material one, and not adequately reparable by damages at law;" and by the term "inadequacy of the remedy by damages" is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood.³ The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage.⁴ It is no objection to the exercise of jurisdiction by Injunction

462 at 1001.

¹ Kerr, Inj., 14, citing *Cuddon v. Morley*, 7 Ha., 206; *Rigby v. Great Western Railway Company*, 2 Ph., 50; *Elmhirst v. Spencer*, 2 Mac. & G., 50; *Child v. Douglas*, 5 D. M. & G., 741; *Dyke v. Taylor*, 3 D. F. & J., 467; *Atty.-Genl. v. Sheffield Gas Co.*, 3 D. M. & G., 304; *Johnson v. Shrewsbury and Birmingham Railway Co.*, ib. at p. 931.

² Spelling's Extraordinary Relief, § 13.

³ *Pinchin v. London and Blackwall Railway Co.*, 5 D. M. & G., 860. See Kerr, Inj., 14; *Ripon v. Hobart*, 3 M. & K., 175; *East Lancashire Railway*

Co. v. Hattersley, 8 Ha., 90; *Atty.-Genl. v. Sheffield Gas Co.*, 3 D. M. & G., 304, 320; *Bloxam v. Metropolitan Railway*, 3 Ch., 354.

⁴ *Wood v. Sutcliffe*, 2 Sim. N. S., 165. This statement was adopted as explanatory of the term "adequate relief," in s. 54, cl. (c) of the Specific Relief Act, in *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pat*, I. L. R., 18 Bom., 488 (1894).

⁵ *Cory v. Yarmouth and Norwich Railway Co.*, 3 Ha., 603; cf. Act I of 1877, s. 54, cl. (b).

that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete.¹

Damage is, however, never irreparable where compensation affords a full and complete remedy.² Nor will an interlocutory Injunction be granted to restrain a wrong which is a mere technical invasion of the plaintiff's rights and does not threaten serious injury.³ As has been concisely said, the Court will not grant an Injunction unless *real injury* is apprehended.⁴ At the same time the damage apprehended or suffered need not be such that were compensation given it would be for a large amount.⁵ Nor on the other hand is the fact that the plaintiff would, on proof of his case, be entitled to heavy damages sufficient ground for the issue of an Injunction. The question in all cases is whether the remedy by Injunction is the *appropriate* remedy, a question which again depends upon another, namely, whether damages would or would not afford *adequate relief*.

Anantnath
Dey v. Mac-
kintosh.

The term "irreparable injury" may, in particular cases owing to circumstances peculiar to this country, bear a wider meaning than would be attached to it by an English Court. So where M obtained a decree against B and others (Hindus), on a title of purchase from them, for possession of an undivided moiety of a dwelling-house to the remaining moiety of which C (a Hindu) alleged

¹ Spelling *loc cit.*, quoting Joyce's Inj. See as to the last sentence in text: *Lumley v. Wagner*, 1 D. M. & G., 616.

² *Kerrison v. Sparrow*, 19 Ves., 449; *Garstin v. Asplin*, 1 Mad., 151; *Cuddon v. Morley*, 7 Ha., 206.

³ Spelling *op. cit.*, § 19.

⁴ *Columbus v. Storey*, 33 Ind., 195 (Amer.), cited in *Hilliard, Inj.*, § 14.

⁵ *Lingwood v. Stowmarket Company*, L. R., 1 Eq., 79. "Whilst I do not

wish to encourage applications to the Court upon trivial matters, on the other hand, I am far from holding out the notion that anything like large or heavy damages must be recovered before the plaintiff can be assisted," *per* Sir W. Page Wood, V. C.; and see *Campbell v. Scott*, 11 Sim., 39; *Goldsmith v. Tunbridge Wells Improvement Commissioners*, L. R., 1 Eq., 169; *Hilliard, Inj.*, 18, 19.

he was jointly entitled, and that he and his family were in possession ; on M's proceeding to obtain execution of his decree, C brought a suit, alleging that M had obtained no title under his purchase and praying for partition of the property. On an application for an interim Injunction to restrain M from executing his decree pending the partition-suit, the Court granted the application and observed as follows :—"Now I ought not to grant an interim injunction, if the mischief against which it is directed is capable of being compensated for by a money-payment or if it is not of such a kind as will cause the plaintiff irreparable damage, supposing that he has the right which he seeks to enforce in his suit. I here advisedly have recourse to the principle of 'irreparable injury,' although I am perhaps giving to it a somewhat wider application than would be accorded to it in the English Courts of Equity on a motion of this kind, because I think that, under the circumstances of native society in this country, there may be such a thing as a trespass which works a truly irreparable injury, although it does not effect a lasting alteration of the subject of enjoyment, and is such as in England might be capable of being compensated for in pecuniary damages. If in this case the question concerned simply possession, without more, of ordinary immoveable property other than a family dwelling-house, I see no reason why the plaintiff should not wait, until he had made out his title, and be then content with the compensation which would be afforded him in respect of the defendant's misdoing, in the shape of pecuniary damages. But here M is seeking to obtain possession of an undivided moiety of a dwelling-house, a portion of the other moiety of which is admittedly in the rightful enjoyment of the plaintiff and his family ; and certainly the plaintiff is in this position that he is

entitled at any time to say that he will have his share divided off from the rest, and that he will not live in the house jointly with any given person who may be entitled to another share in it. He has exercised this right as against M by saying that he will not live in the house jointly with M, and asking for a partition. Of course, if the parties who are jointly entitled to property cannot come to an amicable arrangement for a partition, some interval of time must elapse before a binding partition can be effected between them in the ordinary course of law. If the parties are already in joint possession, that joint possession will generally continue during this interval. But when one of the parties, as in this case, is a new-comer, a difficulty no doubt occurs. Assuming that M has a good title to the moiety of which he is seeking to get possession, inasmuch as an interval must elapse before a partition can be effected, the question before me becomes at any rate narrowed to this: Is M entitled during that interval to force himself into the family-society of the plaintiff, and to make himself, so far as it is practically possible, a member of the plaintiff's joint family in the occupation of the dwelling-house? It appears to me clearly that he is not. I think that a forced joint occupation in this fashion of an undivided dwelling-house by an intruder, even though he be an owner, against the will of the resident Hindu co-parcener, amounts to a proprietary injury which the latter is not in equity called upon to sustain, and for which pecuniary damages would not be compensation. Money alone will not in any degree set the matter right, and therefore the injury is in its character irreparable; also, there can be no doubt, I think, that it is substantial enough to justify the interference of this Court."¹

¹ *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571, 572, 573 (1871), per Phear, J.

The Specific Relief Act enacts the same rules as those in force in England, and in applying those rules the Courts in India should be guided by the decisions of the Court of Chancery which are the source from which these rules have been drawn.¹ In the case of obligations not arising from contract the Court may grant an Injunction in cases where the defendant is trustee of the property for the plaintiff, even though compensation in money would afford adequate relief;² and similarly where the Injunction is necessary to prevent a multiplicity of judicial proceedings.³ And an Injunction may be granted in cases (a) where there exists no standard for ascertaining the actual damage caused or likely to be caused;⁴ (b) where pecuniary compensation would not afford adequate relief;⁵

¹ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 67 (1883). The limitation of the power to grant Injunctions created by s. 54 of the Specific Relief Act is identical with the conditions upon which the Court of Equity in England has always asserted its jurisdiction: *Dhunjabhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 259, 260 (1888). See *Shadi v. Anup Singh*, I. L. R., 12 All., 436, 438, 439 (1889).

² Act I of 1877, s. 54, cl. (a). See Ill. (f) to s. 54 and the Illustration to cl. (a) of s. 12, *ib.*

³ *Ib.*, cl. (e). See Ills. (p) and (q); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 91 (1883) [this clause embraces as well repeated suits by the same plaintiffs as a series by different plaintiffs]; *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 220 (1887); *Moran v. River Steam Navigation Company*, 14 B. L. R., 359 (1875).

⁴ Act I of 1877, s. 54, cl. (b); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom.,

67, 72 (1883); *Ramanadhan v. Zemindar of Ramnad*, I. L. R., 16 Mad., 409, 410 (1893); *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 489 (1894). See Illustration to cl. (b) of s. 12, Act I of 1877.

⁵ Act I of 1877, s. 54, cl. (c); *Ponnusawami Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 24, 25 (1869); *Ramanadhan v. Zemindar of Ramnad*, I. L. R., 16 Mad., 409 (1893); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 67 (1883); *Nandkishor Balgovan v. Bhagubhai Pranbalabddas*, I. L. R., 8 Bom., 95, 97 (1883); *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133 (1877); *G. I. P. Railway v. Nowroji Pestanji*, I. L. R., 10 Bom., 390 (1895); *Ranchhod Jamnadas v. Lallu Haribhai*, 10 Bom. H. C. R., 95, 97 (1873); *Dhunjabhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 259, 260 (1888); *Kalidas Jivram v. Gor Parjaram Hirji*, I. L. R., 15 Bom., 309, 310 (1890); *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*,

and (c) where it is probable that pecuniary compensation cannot be got for the invasion or threatened invasion of the plaintiff's right to or enjoyment of property.¹

Clause (a) has rather application to such cases as are referred to in the Illustrations (h) and (i) to section 54 of the Specific Relief Act where there is no *possible* standard with reference to which the contemplated injury can be compensated than for example to a case of injury to property like a house occupied by its owner in danger of being deprived of its ancient light.² Even if it be difficult to suppose that pecuniary damages would not afford adequate relief, it must be shown that there is some standard for ascertaining them.³

By the term "adequate relief" in clause (b) is probably meant such a compensation as would, though not *in specie* in effect place the plaintiffs in the same position in which they stood before.⁴ It has been said that damages are a sufficient remedy where the injury is not so serious that the property might not still remain the plaintiffs' and be as substantially useful to him as before.⁵ An Injunction will be granted where relief by way of compensation would be tantamount to allowing a trespasser to purchase another man's property against that man's will.⁶

Clause (c) probably refers to cases where the defendant has become insolvent and the like. The Specific Relief

I. L. R., 18 Bom., 488 (1894); *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 674 (1889). See Illustrations to cl. (c), s. 12, Act I of 1877.

¹ Act I of 1877, s. 54, cl. (d); see *ib.*, s. 12, cl. (d), and Illustration thereto.

² *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 489 (1894).

³ *The Land Mortgage Bank of India v. Ahmedbhai Habibbhai*, I. L. R., 8 Bom., 48 (1883).

⁴ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 488 (1894), following *Wood v. Sutcliffe*, 21, L. J. Ch., 255.

⁵ *Dhunjibhai Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 261, 262 (1888); *Kadarbhai v. Rahimbhai*, *ib.* at p. 674 (1889), following *Holland v. Worley*, L. R., 26 Ch. D., 578, 585.

⁶ *Jethtal v. Lalbhai*, I. L. R., 28 Bom., 298 (1904).

Act contains a similar provision with reference to specific performance and gives the following as an illustration thereto. A transfers without endorsement but for valuable consideration a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities and a decree for pecuniary compensation would be fruitless.¹

When the obligation arises from contract the Court is required to guide itself by the rules and provisions contained in Chapter II of the Specific Relief Act relating to specific performance.² According to those rules specific performance may be enforced when the act agreed to be done is in the performance wholly or partly of a trust;³ and also in cases where (a) there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; (b) the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; there being a rebuttable presumption that the breach of a contract to transfer immoveable property cannot be adequately relieved by a compensation in money and that the breach of a contract to transfer moveable property can be thus relieved;⁴ and (c) when it is probable that pecuniary compensation

¹ Act I of 1877, s. 12, cl. (d), and Illustration thereto.

² Act I of 1877, s. 54. An injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced; *ib.*, s. 56, cl. (f); but as to injunctions to perform negative agreements, see s. 57, *ib.*, which forms a proviso to s. 56, cl. (f). *Madras Railway Company v. Ruel*, 1 L. R., 14 Mad., 18, 22 (1890).

³ *Ib.*, s. 12, cl. (a). See Illustration

thereto, which is repealed wherever the Indian Trusts Act is in force. See Act II of 1882, ss. 1, 2.

⁴ *Ib.*, s. 12, cl. (b). See Illustration thereto.

⁵ Act I of 1877, s. 12, cl. (c), and Explanation. See Illustration to cl. (c). So where the right in question was an interest in immoveable property an injunction was granted: *Ramanadhan v. Zemindar of Ramnad*, 1 L. R., 16 Mad., 409 (1893).

cannot be got for the non-performance of the act agreed to be done.¹ The same considerations therefore which would prevent the Court from giving a plaintiff a decree for specific performance will prevent it from granting an Injunction.²

(iv) His conduct must be such as not to disentitle him to assistance.

An Injunction cannot be granted when the conduct of the applicant or his agent has been such as to disentitle him to the assistance of the Court by way of Injunction.³ The conduct of the party who seeks the aid of the Court must be (a) fair and honest, (b) and in particular there must be no acquiescence, (c) or delay. For the jurisdiction of the Court to interfere by way of interlocutory Injunctions in support of a legal title being purely equitable, it is governed upon strict equitable principles. The Court where its summary interference is invoked always looks to the conduct of the party who makes the application, and will refuse to interfere, even in cases where it acknowledges a right, unless his conduct in the matter is free from blame.⁴

Delay defeats equity

(a) It should be fair and honest.

In accordance with a favourite maxim of equity jurisprudence that he who applies for equity must also have done it, a party applying for an Injunction must come into Court with clean hands and a clear conscience. As the relief is of a purely equitable character the plaintiff must come within the equitable conditions generally imposed upon parties asking equitable relief. The party

¹ *Ib.*, cl. (d). See Illustration thereto cited, *ante*, p. 111.

² *Callianji Harjivan v. Narsi Tricum*, I. L. R., 19 Bom., 768 (1895).

³ Act I of 1877, s. 56, cl. (j): *Noyna Meiser v. Rupikan*, I. L. R., 9 Cal., 609, 611 (1882). This provision is an application of the equitable maxim: "He who seeks equity must do equity." "He who comes into equity must come with clean hands." The illus-

trations to s. 56 of the Specific Relief Act are illustrations of this clause. In *Subba Naidu v. Haji Badshah Sahib*, I. L. R., 26 Mad., 166, 175 (1902), it was held there was no such bar and the question of a defendant's refusal to accept an offer was considered.⁵

⁴ *Kerr, Inj.*, 17, 18; and see *Beach, Inj.*, §§ 14-16; *Spelling op. cit.*, § 26.

seeking relief must not be himself at fault.¹ The applicant must satisfy the Court that his own acts and dealings in the matter have been fair and honest² and free from any taint of fraud or illegality;³ that he has not put himself in the wrong;⁴ or brought about the state of things of which he complains; and that he has not dealt in an unfair or inequitable manner in his dealings with his opponent or third parties.⁵

The Court will not interfere when owing to misrepresentation there is any lack of truth in the plaintiff's case.⁶ An Injunction will be withheld when apparently sought for the purpose of obtaining an undue advantage; when in the opinion of the Court it would be used for the purpose of creating mischief; or when it would give the complainant the means of coercing a compromise.⁷ So again it is not sufficient in all cases for the plaintiff to say that he is ready and willing to pay whatever is due. He must first pay what is conceded to be due or what can be seen to be due on the face of the pleadings or affidavits.⁸ Nor can a plaintiff have relief upon an agreement unless it appears that

¹ Beach, Inj., § 14; Spelling *op. cit.*, § 26.

² See Act I of 1877, s. 56, Ill. (c), which is taken from *Perry v. Truefitt*, 6 Beav., 76; and Ill. (b), which is taken from *Morgan v. McAdam*, 36 L. J., Ch., 228; Nelson, Specific Relief Act, 296.

³ So a plaintiff will not get relief if the covenant which he seeks to enforce is tainted with illegality: *Davies v. Makua*, 20 Ch. D., 596; *Kallikandas v. Tulidas*, I. L. R., 23 Bom., 786 (1899).

⁴ See Act I of 1877, s. 57, Ill. (a), which is founded on *Littlewood v. Caldwell*, 11 Price, 97; Nelson *op. cit.*, 296; *Kallikandas v. Tulidas*, I. L. R., 23 Bom., 786 (1899).

⁵ Kerr, Inj., 16, *et ibi casus*.

⁶ *Joseph v. Macoskey* (1892), 96 Cal., 518 (Amer.) cited in Beach, Inj., § 14 [in this case the plaintiff was denied an injunction because he has represented the razors in question to be manufactured in Sheffield, when in fact he did not know where, nor by whom, they were manufactured. See Act I of 1877, s. 56, Ill. (b) and (c)].

⁷ *Ney Manufacturing Company v. Superior Drill Company* (1893), 56 Fed., 152 (Amer.) cited, *ib.*, § 16.

⁸ *State Railroad Cases*, 92 U. S., 567, 616 (Amer.) cited, *ib.* So, for example, it was held that a person seeking to prevent the enforcement of an usurious contract must show that he has paid or tendered the amount justly due, *ib.*

he has actually carried out, so far as in him lies, his own part thereof.¹

In accordance, however, with the rule that a Court of Equity having acquired jurisdiction for one purpose will entertain it for all purposes, it may, where it has acquired jurisdiction of a whole tract of land, afford injunctive relief as to a part thereof, as to which, if it were alone, the relief might be refused by reason of the manner in which the plaintiff acquired it.²

(b) and in particular there must be no acquiescence.

An Injunction cannot be granted to prevent a continuing breach in which the applicant has acquiesced,³ nor where the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. One way in which an applicant may so disentitle himself is if he has stood by for a considerable time and allowed the person against whom he applies to proceed with the action he has taken and lay out money and labour without objection and only applies to the Court after allowing all this to go on for some time.⁴

Parties who have acquiesced and by their conduct encouraged others to alter their condition cannot call upon the Court for its summary interference; and this principle applies with peculiar force when the property on which monies have been expended is mineral property or the like, or if the act complained of is caused by a public company in the execution and construction of their works.⁵ If a man by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully

¹ *De Mattos v. Gibson*, 4 D. & J., 276; *Peto v. Brighton, Uckfield and Tunbridge Railway Co.*, 1 H. & M., 468; *Fechter v. Montgomery*, 33 Beav., 22; *Telegraph Despatch, &c., Co. v. McLean*, 8 Ch., 658.

² *Beach, Inj.*, § 14.

³ Act I of 1877, s. 56, cl. (k).

⁴ *Noyes v. Mieser v. Rupitua*, 1 L. R., 9 Cal., 609, 611 (1882).

⁵ *Kerr, Inj.*, 16; *Hilliard, Inj.*, § 34; *Beach, Inj.*, § 42.

done without his consent, and he thereby induced others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given credit to his words, or to the fair inference to be drawn from his conduct. If a party has an interest to prevent an act being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have, had it been done by his previous license.¹

Acquiescence or forbearance therefore may, in the absence of explanatory circumstances, be an impediment to the assertion of a right²; as where the defendants can say that they had been induced to do anything by an idea of the plaintiff's assent caused by his own acts or omissions.³ It is clear that there must be an injury to acquiesce in;⁴ and that there can be no acquiescence if the party against whom it is alleged was not aware that his rights had been violated;⁵ or permitted an act to take place in error and in ignorance of the consequences.⁶ Acquiescence imports full knowledge.⁷ Parties cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them.⁸ Relief will not be denied to a

¹ *Uda Begom v. Imam-ud-din*, I. L. R., 1 All., 82, 85 (1875), citing *Cairncross v. Lorimer*, 3 Macq. H. L. Cas., 829.

² *Jamnadas v. Atmaram*, I. L. R., 2 Bom. at p. 137 (1877), where the circumstances which constitute delay and acquiescence are discussed [and see *Land Mortgage Bank v. Ahmedbhoy*, I. L. R., 8 Bom. at pp. 53, 84 (1883)].

³ *Id.*

⁴ *Haines v. Taylor*, 2 Ph., 209.

⁵ *Weldon v. Dicks*, 10 Ch. D., 247.

⁶ *Bankari v. Houghton*, 27 Beav., 425, 431; *Johnson v. Wyatt*, 2 D. J. & S., 18; if both parties are equally ignorant the one is not to suffer more than the other; *Greenhalgh v. Manchester and Birmingham Railway*, 3 M. & C., 784, 791. *Bankari v. Houghton*, *supra*.

⁷ *Gopalnarain Mossomdar v. Mudomutty Gupta*, 14 B. L. R., 36 (1874).

⁸ *Marker v. Marker*, 9 Ha., 16.

person on the ground of acquiescence in what he was led to consider a mere temporary violation of his right;¹ nor does the acquiescence in a state of things which produces little injury warrant the subsequent extension of them to an extent productive of serious damage.² The acquiescence may be of one of several co-plaintiffs;³ a corporation or company;⁴ or of an agent;⁵ and the conduct and dealings of a man with others than the party with whom the contest exists may constitute a case of acquiescence.⁶ It has been said that where the plaintiff has protested against his rights being interfered with there is no acquiescence.⁷ But a mere protest is not in general sufficient to exclude the consequences of laches or acquiescence.⁸ If a bare acquiescence is a valid defence, it must be an acquiescence while the act acquiesced in is in progress, and not after it has been completed. If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. Mere submission to an act when it is once completed without any knowledge or assent upon the part of the person whose right is infringed upon is only a submission to an injury, and it cannot take away the right infringed upon when such submission is for any time short of the period of

¹ Kerr, *Inj.*, 19, *et ibi casus*.

² *Ib.*, *Bankart v. Houghton*, 27 Beav., 430.

³ *Marker v. Marker*, 9 Ha., 15.

⁴ *Laird v. Birkenhead Railway Co.*, John, 500; *Hill v. South Staffordshire Railway Co.*, 11 Jur. N. S., 192.

⁵ *Att.-Gen. v. Briggs*, 1 Jur. N. S., 1084; *Miles v. Tobin*, 16 W. R., 466.

⁶ Kerr, *Inj.*, 18, *et ibi casus*.

⁷ *Jamnadas Shankarlal v. Atmaram Harjivan*, 1 L. R., 2 Bom., 137 (1877).

⁸ Kerr, *Inj.*, 18, *et ibi casus*; if money is expended after full and distinct notice of objection and of steps about to be taken, the consequences of acquiescence are excluded.

limitation.¹ The acquiescence must be such as proves plaintiff's assent to the acts complained of and to the injuries which may reasonably be anticipated to flow from such acts.² In all cases in order to justify the application of the principle, it must clearly appear that the party against whom acquiescence is alleged should have full *knowledge* of his rights, and should by his conduct have *encouraged* the other party to *alter* his condition, and that the latter should have acted *upon the faith* of the encouragement so held out.³

If acquiescence be pleaded as a defence, an issue to that effect should be raised. For, if the point be taken, evidence may be given to disprove it. If a plaintiff is *prima facie* entitled to the rights claimed, it is for the defendant to raise the defence that the right has been lost by acquiescence; and if no such objection be taken in the Court of first instance, it will not be entertained by the Court of Appeal.⁴ Further, the onus of proof on any question of acquiescence as either destroying or limiting the plaintiff's rights lies upon the defendant who must satisfy the Court that the plaintiff or his agent has delayed unreasonably to assert the right claimed or has expressly or tacitly assented to what has been done by the defendant.⁵ And to make a case of acquiescence the evidence must be clear and unequivocal.⁶ An amount of acquiescence less than

¹ *Ib.*, *Kunhammad v. Narayanan Mussad*, 1. L. R., 12 Mad., 322, 323 (1888), citing *De Bussche v. Alt*, L. R., 8 Ch. D., 286.

² High, Inj., § 10.

³ Kerr, Inj., 17, citing *Ramsden v. Dyson*, 1 E. & L. App., 129 [followed in *Kunhammad v. Narayanan Mussad*, 1. L. R., 12 Mad., 320, 322, 324 (1888)]; *Onkarapa v. Subaji Pandurang*, 1. L. R., 15 Bom., 73 (1890); *Shaik Husain v. Govardhandas Parmanandas*, 1. L. R., 20 Bom., 6 (1895);

Bankart v. Tennant, 10 Eq., 146; *Greenhalgh v. Manchester and Birmingham Railway Co.*, 3 M. & C., 791; *Marker v. Marker*, 9 Ha., 16; *Russell v. Watts*, 25 Ch. D., 576; *Proctor v. Bennis*, 36 Ch. D., 740.

⁴ *Nandkishor v. Bhagubai*, 1. L. R., 8 Bom., 95, 98 (1883).

⁵ *Benode Coomaree Dossee v. Sou-daminey Dossee*, 1. L. R., 16 Cal. at p. 259.

⁶ Kerr, Inj., 17; *Wavell v. Watson*, W. N. (1866), 344.

that which would be a bar to all remedy may induce the Court to award damages only and not an injunction:¹ though a man may by his acquiescence preclude himself not only from coming to the Court for an Injunction, but from obtaining damages.² Acquiescence may of course be satisfactorily accounted for and explained.³

Though the same principles apply to both temporary and perpetual Injunctions, yet to justify the Court in refusing to give a perpetual Injunction, there must be a stronger case of acquiescence than is sufficient to be a bar on the interlocutory application, for the dismissal of a suit upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost.⁴ "A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by interlocutory order even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must be assumed that the plaintiff had originally a right, but that he has altogether deprived himself of it by acquiescence."⁵

(c) or delay.

It is a general principle that parties seeking an Injunction must come forward speedily.⁶ "*Delay defeats Equi-*

¹ *Sayers v. Collyer*, 28 Ch. D., 103; *Ranchhod v. Lalhu*, 10 Bom. H. C., 96, 97 (1873); and see *Nasarbhai Ahmedbhai v. Munsifi Badrudin*, 1. L. R., 16 Bom., 533 535 (1891).

² *Kelsey v. Dodd*, 52 L. J., Ch., 34; and see *Smith v. Smith*, L. R., 20 Eq., 503.

³ *Joyce's Inj.*, 1264; *Kerr, Inj.*, 19, *et ibi causas*; as for instance that it has taken place upon the faith of a

representation that no grievance would result from or be produced by the act, *ib.*; *Davies v. Marshall*, 10 C. B. N. S., 711.

⁴ *Kerr, Inj.*, 43, 44, 20; see Act I of 1877, s. 56, cl. (A).

⁵ *Gordon v. Chellenham Railway Co.*, 5 Beav., 233, *per* Lord Langdale.

⁶ *Joyce's Doctrines*, 35; *Isaacson v. Thompson*, 20 W. R. (Eng.), 197; 41 L. J., Ch., 101.

ties." But the only bar to the enforcement of a *purely legal* right is the lapse of the time required by the statute of limitations to bar the remedy.¹ Mere laches short of the period prescribed by the law of limitation is no bar to the enforcement of a right absolutely vested in the plaintiff at the period of suit;² and the doctrine of laches and indirect acquiescence apply only to cases in which they can be regarded as a positive extinguishment of right. When they go merely to the remedy the Courts have no power arbitrarily to substitute an extinguishing prescription different from that determined by the Legislature.³ The equitable doctrine of laches applies to executory interests, but in the case of interests which are executed mere laches will not of itself disentitle the party to relief unless such party by standing by waive or abandon any right which he may possess, and which therefore under the circumstances he is not entitled to enforce.⁴

It has been held by the Madras High Court (though the point was *obiter dictum*), that the equitable doctrine of laches and acquiescence is not applicable to suits for which a period of limitation is provided by the Limitation Act,

¹ *Venkopadhyaya v. Kavari Henguru*, 2 Mad. H. C. R., 36 (1864); *Seshamma v. Subbarayadu*, I. L. R., 18 Mad., 403 (1895). So conversely where the positive law assigns certain consequences to a particular possession or enjoyment for a specified term that result is not defeated by any mere assertion of a claim without the alleged right being reduced to *res litigiosa* by proceedings in Court. *The Land Mortgage Bank of India v. Ahmedbhai Habibbhai*, I. L. R., 8 Bom., 84, 85 (1888).

² *Peddathakulaty v. Timma Reddy*, 2 Mad. H. C. R., 270, 273.

³ *Peddathakulaty v. Timma Reddy*, 2 Mad. H. C. R. at p. 275. See *Jam-*

nadas Shankarlal v. Atmaram Harjivan, I. L. R., 2 Bom. at p. 138 (1877); *Tarruck Chunder v. Harri Shunker*, 22 W. R., 267 (1874); *Shaikh Ally Hossein v. Sheikh Muzkur Hossein*, 4 C. L. R., 577 (1879); *Rampal Shahoo v. Misree Lal*, 24 W. R., 97 (1875). The law relating to laches and limitation are of course distinguishable. Under the latter law laches even for the whole of the prescribed period, less only a day, cannot deprive the plaintiff of his right of action for he may institute his action on that day. See *Mad. L. J.*, Vol. V., Pt. X. p. 376.

⁴ *Clarke v. Hart*, 6 H. L. Cas., 633; 6 D. G. M. & G., 332; 19 Beav., 349.

and that lapse of time as a defence to such suits can only be relied upon when under the Act it has become a bar.¹ Unlike acquiescence, delay is not particularly mentioned in the Specific Relief Act, though it might possibly be held to be included within the terms of section 56, clause (7).

Sir James Fitzjames Stephen in his speech upon the Bill which became the Specific Relief Act observed that the Indian Legislature did not intend to deal with the question of delay in seeking specific relief, for the statute of limitations had, unlike the English law, provided specific periods of limitation for these reliefs. But the Courts have not failed themselves bound by these observations. The Act gives the Court a discretion to grant or withhold specific relief, even when circumstances justifying the awarding of such relief exist. Where therefore relief is discretionary, the Court would be justified in refusing relief on the ground of laches, even though the plaintiff's suit may have been instituted within the period allowed by the law of limitation.² The right rule in these matters is submitted to be as follows :—There must ordinarily be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies. But a distinction is to be drawn between those cases in which a suitor seeks some relief which, if he proves his case, the Court is *bound* to grant him, and the cases in which the Court has a *discretion* to grant or refuse such relief. In the first class of cases *mere delay* short of the period of limitation is not sufficient to deprive the suitor of his right

¹ *Ram Rau v. Raja Rau*, 2 Mad. H. C. R., 114 (1864); this is no doubt so with regard to delay where the relief is not discretionary. See *Uda Begam v. Imamuddin*, 1, L. R., 1 All., 86 (1875). So delay by the owner in bringing a suit for the recovery of land is not in itself sufficient to create an

equity in favour of the person spending money on the land so as to deprive the owner of his strict rights; *Premji Jivan Bhate v. Haji Casarum Juma Ahmed*, 1, L. R., 20 Bom., 298 (1895).

² See Madras L. J., Vol. V., Pt. VII, pp. 217, 218.

of action. But where there is more than merely delay, where there is conduct of language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead *acquiescence*, and the plea, if sufficiently proved, ought to be held a good answer to an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. When a suitor has a right to demand relief a stronger case must be made out against him than when the Court has a discretion to grant or refuse it. When it has such a discretion either *delay* or *acquiescence*, under the particular circumstances of the case, may be a bar to the grant of relief.¹

Mere delay must be distinguished both from acquiescence and release or abandonment of right. Quiescence is not acquiescence. There must be something more than cessation of action to constitute acquiescence. But inaction may imply and be evidence of acquiescence.² It is not easy to gauge the precise effect of the decisions dealing with delay for in nearly every instance where delay becomes material, it is evidence of acquiescence or is coupled with other conduct which is held to disentitle the applicant to relief. So far as delay is evidence of acquiescence, it will be dealt with under the preceding rules relating to acquiescence. The question in so far as it relates to mere delay is one of greater difficulty.

The Court has a wide discretion, and it seems that delay though it may not amount to proof of acquiescence may be sufficient under the particular circumstances of the case

¹ See *Uda Begam v. Imam-ud-din*, I. L. R., 1 All., 82, 86, 87 (1875); See *Beach, Inj.*, § 43.

² *Benode Coomari Dossee v. Soudamincy Dossee*, I. L. R., 16 Cal., 261

(1889); *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 137 (1877); as to mere quiescence, see *Baswantapa Shidapa v. Rana*, I. L. R., 9 Bom., 86 (1884).

to disentitle a suitor to the summary interference of the Court by a temporary Injunction.¹ The Court cannot avoid being influenced by the fact of delay; for, amongst other things, it may be calculated to throw considerable doubt upon the reality of the alleged injury and will compel the Court to weigh carefully the inconvenience which may be sustained by reason of the issue of the Injunction.² The principles with respect to delay equally apply to perpetual Injunctions, but to justify the refusal of the Court to interfere on this ground, a stronger case is required to be made out than is necessary upon an interlocutory application.³ It has been recently held⁴ that, even according to the English decisions mere delay is not a sufficient cause, and that inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief is within the discretion of the Court, mere lapse of time short of the period of limitation should ordinarily be held not to be a good ground for refusing relief.⁵ To operate as a bar to relief the delay should be such as to amount to waiver of the plaintiff's right by acquiescence, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted. When such is

¹ Kerr, *Inj.*, 21; Joyce's *Doctrines*, 34—36; Hilliard, *Inj.*, § 34; *Spelling op cit.*, § 26. See *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5, 7 (1881); *Amolak Ram v. Sahab Singh*, I. L. R., 7 All., 550, 552 (1885); *Nanabhai Ganpatrav Dhairyaan v. Janardhan Vasudev*, I. L. R., 12 Bom., 110, 121 (1886).

² *Ware v. Regent's Canal Co.*, 3 DeG. & J., 230.

³ Kerr, *Inj.*, 43, 44. See *Jamna-
'29 Shankarlal v. Atmaram Harjivan*,

I. L. R., 2 Bom., 137, 138 (1877); *Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 35, 52, 84 (1883).

⁴ *Athikaratu Nanu Menon v. Erathanikal Komu Nayar*, I. L. R., 21 Mad., 42 (1897).

⁵ As to the immateriality of acquiescence when understood as only abstention from legal proceedings, see *Rochdale Canal Co. v. King*, 2 Sim. N. S., 89.

not the case any lapse of time should not disentitle a claimant to relief to which he has otherwise shown his title.¹

Delay is not material so long as matters remain *in statu quo*,² and it does not mislead³ the defendant or amount to acquiescence.⁴ It must be shown that the delay has prejudiced the defendant.⁵ The supreme importance of this consideration is insisted upon by the Privy Council in the judgment in the *Lindsay Petroleum Company v. Hurd*:⁶—"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted: in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable."

On the whole, the tendency of the Courts is to discourage the plea of laches, unless somebody has been damnified by it, and as in this country the period of limitation enacted

¹ *Athikaratu Nanu Menon v. Erathanikal Komu Nayar*, I. L. R., 21 Mad., 42 (1897); citing *Erlanger v. New Sombrero Phosphate Company*, L. R., 3 App. Cas., 1218; *Rochefoucauld v. Boustead*, L. R., 1897, 1 Ch. D., 196; *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133 (1877).

² *Gale v. Abbott*, 8 Jur. N. S., 987; *Archbold v. Scully*, 9 H. L., 388.

³ *The Land Mortgage Bank of India*

v. Ahmedbhoy Habibbhoy, I. L. R., 8 Bom., 84, 85 (1883).

⁴ *Ib.*

⁵ *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 138 (1877); *Nanabhai Ganpatrav Dhairyaevan v. Janardan Vasudev*, I. L. R., 12 Bom., 110, 121 (1886).

⁶ L. R., 5 P. C., 239, cited in *Jamnadas Shankarlal v. Atmaram Harjivan*, *supra*.

by the statute is generally very short, there is the less need for the application of the equitable doctrines relating to delay.¹ Delay may, of course, be satisfactorily explained;² as was done in the first of the cases last cited where there had been a delay of nearly five years. And in the second of those cases it was added that no instance had been adduced in which, after full notice that the plaintiff would take legal proceedings in the event of an injury to his property, he has been deprived of any portion of his remedy against a defendant through a mere delay in bringing his suit, not being such as to induce a reasonable supposition of final acquiescence.³ Where there has been delay the cause for it should appear upon the affidavits.⁴ With regard to delay as affecting the issue of mandatory Injunctions, *v. post.*

(v) There must be a greater convenience in granting than in refusing the Injunction :

The Court in granting an *interim* Injunction will be guided by the question of convenience or inconvenience and will look at two things. It will first see whether there is a *bond fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience, if the Injunction do not issue, bearing in mind the important principle of retaining immoveable property *in statu quo*.⁵ The burden lies upon the plaintiff, as the person

¹ See Madras L. J., Vol. V, Pt. VII, p. 218.

² *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 52, 53 (1883); *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 138 (1877); *Joyce's Inj.*, 1264.

³ This was a case of mandatory injunction and the rule in so far as it relates to such injunction appears to have been too broadly stated. See *Benode Coomaras Dossee v. Souda-*

miney Dossee, I. L. R., 16 Cal., 252, 264—266 (1889), *post*.

⁴ *Assur Purshotam v. Ratanbai*, I. L. R., 13 Bom., 56, 57 (1888).

⁵ *Gomes v. Carter*, 1 Ind. Jur. N. S., 411, 412 (1866), *per* Phear, J.; *Anant-nath Dey v. Mackintosh*, 6 B. L. R., 571, 573 (1871); *Ruplal Khettry v. Mahima Chandra Roy*, 5 B. L. R., 254, 257 (1870), *per* Norman, J., following *Bacon v. Jones*, M. & Cr., 433. See *Kerr, Inj.*, 25, 26.

applying for the Injunction, of showing that his inconvenience exceeds that of the defendant. He must make out a case of a comparative inconvenience entitling him to the interference of the Court.¹ So also in the case of perpetual Injunctions the consideration of the balance of convenience and inconvenience is not neglected by the Court. The principle is well settled that in granting or withholding an Injunction, the Courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which, the Injunction, if granted, would inflict upon the defendant.² Where there is a right it cannot be limited by the religious prejudices of neighbours.³

The original jurisdiction to decree Injunctions was based on the fact that Courts of Common Law could afford no remedy at all or at any rate a remedy that was imperfect or inadequate to the circumstances of the case.⁴ It was a valid objection in all cases of applications for relief by Injunction that the party aggrieved had a full and adequate remedy at law. Where it did not appear that the remedy at law was inadequate, or that the party aggrieved was entitled to more speedy relief than that which could be obtained by the ordinary process of a Court of Common Law an Injunction was refused. But the remedy at law must have reached the necessities of the case. Unless such a legal remedy was shown, a Court of Equity might have lent its aid by Injunction notwithstanding the existence of a nominal remedy at law.⁵

¹ *Child v. Douglas*, 5 D. M. & G., 741. In *Subba Naidu v. Haji Badaha Saheb*, I. L. R., 26 Mad., 168, 175 (1902) the balance of convenience was held to be in favour of the issue of an injunction.

² *The Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14

Cal., 189, 200 (1886), per Wilson and Porter, JJ. See Kerr, *Inj.*, 42, 43.

³ *Behari Lal v. Ghisa Lal*, I. L. R., 24 All., 499 (1902).

⁴ v. ante, p. 29; *Spelling op cit.*, § 4.

⁵ *Spelling loc cit.*, §§ 13, 16, *High, Inj.*, § 30.

(vi) and equally efficacious relief must not be obtainable by any other usual remedy except in case of breach of trust.

Thus for example an Injunction would not be granted where damages were an adequate remedy; or where the applicant had such a remedy by motion to quash, or set aside, the writ or order complained of, or by application to revoke a void order; or where an action at law was fully adequate and available; or where the party had his remedy by attachment, *certiori*, appeal, *mandamus*, or the like.¹ In the same manner the Specific Relief Act provides that except in cases of breach of trust an Injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding.²

This provision is an enactment of the general principle that an Injunction, like Specific performance, is an exceptional form of relief intended to supplement the defects of the usual mode of proceeding, and therefore applicable only where the ordinary remedy is either inadequate or not available. The exception relative to cases of breach of trust is grounded upon the fact that the beneficiary, being to the limit of his interest, the true owner of the property, has a right to restrain the trustee from dealing with it on his behalf, otherwise than as a prudent owner would deal with it.⁴

In the undermentioned case⁵ the Surat City Municipality served under section 82, clause (3), of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house-tax due by him. The plaintiff instead of proceeding under section 86 of the Act instituted a suit in the Civil Court for an Injunction to restrain the Municipality from recovering the house-tax from him. The lower courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a

¹ Beach, *Inj.*, §§ 26—30.

² Act I of 1877, s. 56, cl. (i); *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 609, 611 (1882).

³ Collett's Specific Relief Act, 354.

⁴ *Ib.* at p. 294.

⁵ *Chunilal v. Surat City Municipality*, I. L. R., 27 Bom., 403 (1903).

Magistrate under section 86 of the Act, his suit was premature. *Held*, that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But *held*, also (confirming the decree), that the Injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an Injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it, he filed this suit for an Injunction. It was discretionary for a Court to grant an Injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind.

Repeated violations, however, of an established legal right cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained.¹

Where a suit² was brought to obtain an Injunction restraining the defendants from building an indigo factory on the land leased to him, it was argued that if the erection of an indigo factory renders the land unfit for the purposes of the tenancy, the plaintiff is under section 25, clause (a) of the Bengal Tenancy Act, entitled to eject the tenant and that is a more complete remedy than a remedy by way of Injunction. And if that is so, the Court should not entertain a suit for the less complete remedy. The Court, however, observed as follows :—“ We are of opinion that

¹ *Apaft Patil v. Apa*, I. L. R., 26 Bom., 735 (1902).

² *Burendra Narain Singh v. Hari*

Mohan Misser, I. L. R., 31 Cal., 174 (1903).

this contention has several answers to it. One of them is this: the landlord may not want to eject the tenant, but may be content to have the land prevented from being changed prejudicially to his interest or being rendered unfit for the purposes of the tenancy, and there is no reason why he should not be allowed to claim this lesser remedy. Then in the next place the plaintiff here is a co-sharer landlord, and unless his other co-sharers joined he could not, regard being had to the provisions of section 188 of the Bengal Tenancy Act, maintain a suit for ejectment of the tenant. There is nothing in section 54 of the Specific Relief Act to show that an Injunction is not claimable in a case like the present. On the contrary illustration (k) of that section, if not quite in point, shows that the Legislature did not intend to exclude cases like the present from the scope of section 54.

The Court should not by refusing an Injunction and allowing compensation let a trespasser put a value or money's worth on another man's property and deprive him of it against his will.¹ The Court in the last mentioned case observed as follows:—"Section 54 of the Specific Relief Act lays down in effect that a perpetual Injunction shall not be granted where the Court finds that the invasion by one man of another man's right to property is such that pecuniary compensation can afford adequate relief. But where a man builds on another man's property against the will of the latter or without his consent, the invasion is practically one where pecuniary compensation cannot be regarded as adequate relief. The owner is, in such a case, not only deprived of the property but he is also deprived permanently of such user of it as he is entitled to make. How are the damages to be estimated

¹ *Jethalal Hirachand v. Lalbhai Dalpatbhai*, I. L. R., 28 Bom., 298, 303, 304 (1904).

in such a case and how can it be said that an award of compensation can do justice to the owner who loses the property, and all opportunity besides of using it for purposes which he may consider profitable, or beneficial to himself? The principle upon which such cases are to be decided was enunciated by Lord Selbourne, L. C., in *Goodson v. Richardson*¹ where he said: 'I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law, a series of trespasses from time to time to the gain and profit of the trespasser, without the consent of the owner of the land, and it appears to me as such to be a proper subject for an Injunction.' And there he distinguished between such cases and cases of ancient lights and covenants. In the former one man appropriates to himself and uses another man's property; in the latter one man does something upon his own property which exposes him to an action by another man. The Courts lean towards compensation in the latter class of cases because the wrong is done by the wrong-doer upon his own property. It would not have been a wrong, but for the fact that his right of free user as owner happens to be subject to the right acquired by another man for the enjoyment of his property and restricting the absolute right of property of the former. In such a case when anything is done in violation of right limiting another man's right of ownership, the Court naturally has to consider whether the violation can be compensated by damages. But it is a different thing when a man illegally builds upon another man's land, or builds in such a way as to overhang a portion of it. There, to use the words of James, L. J., in *Goodson v. Richardson*, he is taking that which was not his for the purpose of a profit to himself against the will

L. R., 9 Ch., 221, 224.

of the real owner. That is taking another man's property improperly both morally as well as legally. Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will. On no principle of law or equity is that allowable and the current of decisions whether here or in England is opposed to it.

Perpetual Injunctions.

§ 31. After the establishment of the legal right and of its violation, the plaintiff may claim a perpetual Injunction to prevent the recurrence of the wrong. An interlocutory Injunction is not decisive upon the merits of the case, but a perpetual Injunction being in effect a decree is conclusive upon all parties in interest. The jurisdiction is founded on the equity of relieving a man from the necessity of bringing action after action for every violation of his right and of finally quieting the right, after a case has received such full decision as entitles the plaintiff to be protected against further trials of that right.¹

The aforementioned principles apply equally to perpetual as well as to temporary Injunctions with the exceptions hereinafter stated. Whereas upon an application for a temporary Injunction, the plaintiff is required merely to show a clear *prima facie* case: in order to obtain a grant of a perpetual Injunction, the legal right must have been *established*, as well as the facts of its actual or threatened violation productive of serious damage. A permanent Injunction is only granted when (1) some established right has been invaded, and (2) when damage has accrued or must necessarily accrue from the act or omission complained of.² There must have been (1) a material injury to a clear legal right; and (2) damages must not be

¹ See Kerr, *Inj.*, 42—48; *Imperial* 451.

Gas Company v. Broadbent, 7 H. L., 612; *Louder v. Bettle*, 33 L. J. Ch.,

² *Krishna Ayyan v. Venkatachelli Mudali*, 7 Mad. H. C. R., 60, 71 (1872)

a sufficient compensation.¹ The conduct of the applicant and his agents must not have been such as to disentitle the applicant to relief,² and the principles relating to delay and acquiescence³ are equally applicable to the case of perpetual as to that of temporary Injunctions.

However to justify the Court in refusing to interfere there must be a stronger case of acquiescence than is sufficient to be a bar upon the interlocutory application. The Court will not act upon light grounds against the legal rights of the parties. There must be fraud or such acquiescence as, in the view of the Court, would make it a fraud in the applicant to insist upon his legal rights.⁴ The Court will consider the balance of convenience or inconvenience,⁵ and will not grant a perpetual Injunction when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;⁶ and will lastly in general, before exercising its jurisdiction, have regard not only to the dry strict rights of the plaintiff, but also to all the surrounding circumstances of the case.⁷

§ 32. In addition to the preventive jurisdiction there is super-added the power of the Court to grant a mandatory Injunction, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made. A mandatory Injunction may be either temporary or perpetual⁸

Mandatory
Injunctions.

¹ *Akilandammal v. S. Venkatachela Mudali*, 6 Mad. H. C. R., 112, 116 (1871), following *Straight v. Burn*, L. R., 5 Ch. App., 163; see Act I of 1877, s. 54.

² Act I of 1877, s. 56, cl. (j); v. *ante*, p. 112.

³ *Ib.*, cl. (h); v. *ante*, pp. 114, 118.

⁴ *Kerr*, Inj., 43, 44; v. *ante*, pp. 117, 118.

⁵ v. *ante*, p. 124.

⁶ Act I of 1877, s. 56, cl. (i); v. *ante*, pp. 125, 126.

⁷ *Wood v. Sutcliffe*, 2 Sim. N. S., 166. See as to the general principles governing the grant of perpetual Injunctions, Act I of 1877, ss. 54, 56, *passim*.

⁸ v. *ante*, p. 29; Act I of 1877, s. 55; the Court may order that the operation of the Injunction shall be

and the principles regulating its grant are those which are applicable to preventive Injunctions, temporary or perpetual, as the case may be. It is granted generally on the same principles and subject to the same conditions as a perpetual Injunction. When a mandatory Injunction is granted under section 55 of the Specific Relief Act two elements have to be taken into consideration; in the first place the Court has to determine what Acts are necessary in order to prevent a breach of the obligation; in the second place the requisite acts must be such as the Court is capable of enforcing.¹ As already observed caution is required in the grant of all preventive relief. It has, however, been said that the exercise of the power to grant mandatory Injunctions must be attended with the greatest possible caution, and that, although every case must depend upon its own circumstances, the Court will not interfere except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld. The tendency, however, of modern decisions is towards a less sparing exercise of the jurisdiction than prevailed formerly.²

A mandatory Injunction may be issued in respect either of a breach of contract,³ or of an obligation arising in tort. So if a person by new building obstructs ancient lights, an Injunction may be obtained against him, not only

suspended until after a certain period : *Smith v. Smith*, 20 Eq., 505; 1 Set., 199.

¹ *Lakshmi Narain Bannerjee v. Tara Prosanna Bannerjee*, 1 L. R., 31 Cal., 944, 949 (1904).

² *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181, 188 (1871), *per Sargent, J.*, citing *Leemberg v. East India*

House Estate Company, 3 D. J. & S., 263; *Durrell v. Pritchard*, L. R., 1 Ch. App., 244.

³ *Kerr, Inj.*, 480—484; *Ranchhod Jamnadas v. Lallu Haridas*, 10 Bom., H. C. R., 95 (1873). As to mandatory Injunctions to carry out considerable public works, see *Municipal Commissioners of Madras v. Branson*, 1 L. R., 3 Mad., 201, 210 (1881).

restraining him from going on with the buildings, but also ordering him to pull down so much of them as obstructs these lights.¹ A mandatory Injunction may be granted to restrain the publication of a libel, even though it may be shown not to be injurious to the complainant's property.² It has been held in England that in exercising the jurisdiction by way of mandatory Injunction against acts in violation of contract, covenant or agreement, the Court looks to the express stipulation of the agreement, and is not, as in cases of trespass or nuisance, influenced by considerations as to the nature or extent of the damage, or the comparative convenience or inconvenience of granting or withholding the Injunction; for that a man who enters into an agreement is bound in equity to a true and literal performance of it, and cannot be suffered to depart from it at his pleasure, leaving the other party to his remedy by damages at law.³ It seems, however, in this country that, subject to the provisions of section 57 of the Specific Relief Act, the principles governing the

¹ Act I of 1877, s. 55, Illustration (a); and see *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181 (1871); *Ranchhod Jamnadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873); *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133 (1877); *Nandkishor Balgovan v. Bhagubhai Pranhalaabhdas*, I. L. R., 8 Bom., 95 (1883); *Kadambhai v. Rahimbhai*, I. L. R., 13 Bom., 674 (1889); *Ghanasham Nilkant Nadkurni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474 (1894); *Benode Coomaree Dossee v. Soudaminy Dossee*, I. L. R., 16 Cal., 252 (1889); *Balu v. Maharu*, I. L. R., 20 Bom., 788 (1895); *Yaro v. Anauallah*, I. L. R., 19 All., 259 (1897).

Other torts. As to right of way, see *G. I. P. Railway Company v. Now-*

roji Pestonji, I. L. R., 10 Bom., 390 (1885); trespass, *Jawabji v. H. A. Emile*, I. L. R., 13 All., 98 (1890); Act I of 1877, s. 55, Illustration (b); ouster by co-sharer; *Shadi v. Anup Singh*, I. L. R., 12 All., 436 (1889); landlord and tenant; *Ramanadhan v. Zamin-dar of Ramnad*, I. L. R., 16 Mad., 407 (1893). Breach of confidential communication, Act I of 1877, s. 55, Illustrations (c), (f), (g); infringements of rights in letters, *ib.*, Illustration (d); copyright, trade-mark, *ib.*, Illustration (g), and so forth.

² Act I of 1877, s. 55, Illustration (e) as to the law prior to the Act, see *Shepherd v. Trustees of the Port of Bombay*, I. L. R., 1 Bom., 132, 477 (1876).

³ Kerr, *Inj.*, 480, 481.

grant of Injunctions are the same, whether the acts sought to be restrained by a breach of contract or a tort.¹ In both cases there must be no acquiescence and damages must not be a sufficient remedy,² and the restoration of things to their former condition must be the only relief which will meet the requirements of the case.

Prompt action is essential if a mandatory Injunction is the desired remedy.³ Where a plaintiff has not brought his suit or applied for an Injunction at the earliest opportunity, but has waited till the act complained of by him has been completed, and then asks for a mandatory Injunction, such an Injunction will not in general be granted.⁴ The Court will seldom interfere to pull down a building which has been erected without complaint,⁵ and unless very serious damage would otherwise result will not order a building already finished to be pulled down⁶: though the Court will have regard to the character of the building sought to be removed,⁷ and there is no rule which prevents the Court from giving relief where the injury sought to be restrained has been completed before the commencement of the action.⁸ Where the defendants thought fit to carry up a wall since the decree of the Lower Court, notwithstanding an appeal to the High Court, a mandatory Injunction was issued directing them to remove it.⁹

¹ See Act I of 1877, ss. 12, 54.

² *Ranchhod Jamnadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873); Kerr, *Inj.*, 49; *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom., 95 (1883).

³ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 492 (1894); Kerr, *Inj.*, 50, 51.

⁴ *Benode Coomaree Dossee v. Sou-daminey Dossee*, I. L. R., 16 Cal., 252 (1889). See *Haji Syed Mahomed v. Gulab Rai*, I. L. R., 20 All., 345

(1898).

⁵ *Benode Coomaree Dossee v. Sou-daminey Dossee*, I. L. R., 16 Cal., 266 (1889).

⁶ *Gort v. Clark*, 16 W. R. (Eng.), 569. See *Sparling v. Clareon*, 17 W. R. (Eng.), 518.

⁷ *Baxter v. Bower*, 44 L. J. Ch., 625.

⁸ Kerr, *Inj.*, 50.

⁹ *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 674 (1889).

Where a temporary Injunction had been granted against building it was held on appeal that it must be maintained on the principle that in such a case matters should be allowed to remain as far as possible *in statu quo*, and that the defendant must not be placed in a position to say afterwards upon the basis of his own act that on equitable considerations demolition should not be insisted upon.¹

Mere notice not to continue to obstruct plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting a mandatory Injunction.² The fact that the plaintiff has given notice of objection to what is threatened before it has been carried out, does not make the Injunction a thing of course.³ On the other hand, if the act complained of is continued or carried on after notice that it is objected to and the injury is of a serious nature, the jurisdiction will be exercised more freely than in cases where complaint is not made until after it is completed.⁴

In the undermentioned case⁵ plaintiff sued to restrain the defendants from erecting a certain door. The plaint also contained a prayer for "such other relief as the Court might think fit." After filing the plaint the plaintiff applied for an *interim* Injunction pending the hearing of the suit, which, however, was refused. The defendants thereupon erected the door, and at the hearing contended that inasmuch as the plaint prayed only to prevent the erection of the door and not for its removal when erected the plaintiff could not obtain the latter relief in this suit but must file a fresh suit. The lower Court dismissed the

¹ *Chandra Nath Pal v. Sree Gobind Chowdhuri*, 6 C. W. N., 308 (1900).

² *Benode Coomaree Dossee v. Sou-daminey Dossee*, 1, L. R., 16 Cal., 252 (1889); but see *Jamndas Shankarlal v. Atmaram Harjivun*, 1, L. R., 2 Bom., 137, 139 (1877).

³ *The Shamnugger Jute Factory Company v. Ram Narain Chatterjee*, 1, L. R., 14 Cal., 189, 200 (1886).

⁴ *Kerr, Inj.*, 49, 50.

⁵ *Maganlal v. Chhotalal*, 1, L. R., 26 Bom., 136 (1901).

suit, holding that on the erection of the door a new and different cause of action had arisen for which a fresh suit must be filed on appeal. *Held* (reversing the decree and remanding the case), that on the suit as framed the Court could grant a mandatory Injunction for the removal of the door. The suit was rightly framed in the light of the circumstances which existed when it was brought. It was the defendant's subsequent conduct which rendered it necessary that the plaintiff should be given as prayed for in his plaint, such other relief as the Court might think fit. The Court will take into consideration the comparative convenience and inconvenience which the granting or withholding the Injunction would cause to the parties.¹ But if the plaintiff has sustained an injury which can be effectually remedied in only one way, it is in general no ground for depriving the plaintiff of relief that the defendant will suffer more by the issue of an Injunction than the plaintiff, if his claim could be reduced to money, would suffer by being awarded merely a money-compensation.² It lies upon the defendant to show and prove the defence that the right has been lost by reason of acquiescence or delay.³ A mandatory Injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.⁴

A mandatory, like any other, Injunction should be enforced by execution of the decree in which it was given. A suit will not lie for damages for non-compliance with the Injunction.⁵

¹ Kerr, 49.

² *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133, 139 (1877).

³ *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom.,

98 (1883).

⁴ *Navroji v. Dastur*, I. L. R., 28 Bom., 20 (1903).

⁵ *Jawatri v. H. A. Emile*, I. L. R., 13 All., 98 (1890).

§ 33. Where a suit is brought to obtain an Injunction and the facts disclosed are such that the plaintiff is entitled to some relief, that relief will be one of three ascertained forms, namely: (1) an Injunction; (2) damages; (3) a combination of an Injunction with damages. The Court cannot compel a plaintiff who is entitled to its aid by Injunction or damages to accept some other form of relief than those abovementioned.

If upon a consideration of all the facts and of the principles regulating the grant of preventive relief an Injunction is the appropriate remedy, the Court will issue an Injunction temporary or perpetual aptly formed to meet the requirements of the particular case. The granting of preventive relief is entirely within the discretion of the Court.¹ The principles upon which the Court exercises this discretion have been dealt with in the preceding pages.²

If the Court be of opinion that looking to these principles the case is not one for which an Injunction is a fitting remedy, it has a discretion to grant damages in lieu of an Injunction.³ The grounds upon which this discretion to grant damages in lieu of an Injunction should be exercised have been the subject of discussion in several reported Indian cases. Formerly the Court of Chancery had no inherent power to ascertain the amount of damages sustained by reason of tortious acts unattended with profits to the wrong-doer. The jurisdiction to give and assess damages in respect of such acts was first conferred on the Court of Chancery⁴ by Lord Cairns, Act, 21 and 22 Vict., c. 27.

By that Act the Court of Chancery was empowered, if it thought fit, "to award damages instead of granting an

¹ Act I of 1877, s. 52.

² v. ante, §§ 29—32.

³ *Land Mortgage Bank of India v.*

Ahmedbhoy, I. L. R., 8 Bom., 70 (1883).

⁴ Kerr, *Inj.*, 39; Joyce, *Inj.*, 593

—595.

Relief which may be given in a suit for an Injunction.

(i) An Injunction.

(ii) Damages.

Injunction in cases falling within its jurisdiction, and since that Act it has had to exercise the same discretionary power when the question has arisen whether damages or preventive relief should be granted. The particular effect of that Act does not appear to have received much consideration until the case of *Aynsley v. Glover*.¹ The full discussion it then received makes it unnecessary to refer to earlier authorities. The Master of the Rolls in that case, after discussing the earlier decisions which doubtless reveal a great variety of opinions, expresses his own view to be 'that whenever an action can be maintained at law and really substantial damages, or perhaps I should say considerable damages, can be recovered at law, there the Injunction ought to follow in equity; generally, not universally.' He then refers to Lord Cairns' Act, and points out that the Act 'gives a new power to the Court purely discretionary to substitute damages' in cases in which 'before the passing of the Act this Court would have granted an Injunction,' expressing an opinion that it is 'a reasonable discretion' and must depend upon the special circumstances of each case whether it ought to be exercised'; and as an illustration of its application he refers with approval to *Curriers' Company v. Corbett*² as showing that the Court will take into consideration the fact of the injury to the plaintiff being of a slight nature (although sufficient to sustain an Injunction) as contrasted with the serious damage to the defendant. The subsequent decisions by the Master of the Rolls, *Smith v. Smith*³ and *Krehl v. Burrell*,⁴ afford further illustrations of the principle on which

¹ 18 Eq., 546 at pp. 553, 554 & 555.

² "This discretion must be a judicial discretion, exercised according to something like a settled rule, and in such a way as to prevent the defendant doing a wrongful act and

thinking he could pay damages for it." per Sir G. Jessel, M. R., in *Smith v. Smith*, L. R., 20 Eq., 505.

³ 2 Dr. & Sm., 355.

⁴ 20 Eq., 500 at p. 505.

⁵ 7 Ch. Div., 551 at p. 554.

the discretion vested in the Court of Equity of awarding damages in lieu of an Injunction should be exercised. In *Holland v. Worley*,¹ Mr. Justice Pearson, after referring to the above decisions by Sir G. Jessel, laid down the rule, which he said he thought would be in accordance with the view of the Master of the Rolls, that in those cases (of infringement of easements) where the injury would not be so serious, where the property might still remain the plaintiff's and be as substantially useful to him as it was before, the Court may, if it thinks fit, exercise the discretion given it by the Act.'''

In the case last cited it was, however, said² that the question, whether damages are a sufficient compensation does not present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England. This latter Court in awarding damages under Lord Cairns' Act exercises a discretionary power in departing from the specific relief which it had hitherto exclusively afforded, and could scarcely be expected to take so broad a view of the subjects as the Courts of this country whose duty it is under the Specific Relief Act not to grant an Injunction where damages afford adequate compensation.

''The power of the Courts of India to grant a perpetual Injunction is determined by the Specific Relief Act I of 1877, section 54.³ It is to be remarked that this limitation of the power of granting an Injunction is identical with the conditions upon which the Court of Equity in

¹ 26 Ch. Div., 585 at p. 587.

² Per Sargent, C. J., in *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252 (1888), at pp. 260, 261. The passage has been slightly abridged in the text.

³ *Ib.* at p. 261.

⁴ Which provides that the Court may grant such an Injunction when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property; and where the invasion is such that pecuniary compensation would not afford adequate relief.

England has always asserted the jurisdiction of granting preventive relief in cases of this nature. In *Attorney-General v. Nichol*,¹ Lord Eldon says 'that the foundation of the jurisdiction appears to be that injury to property which renders it in a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The Court considers that injury of this nature does not admit of being measured and redressed by damages.' In *Straight v. Burn*,² Lord Justice Giffard says: 'I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, the Court will interfere by Injunction.'³

"Now, it is to be observed that the Specific Relief Act whilst laying down the general principles upon which such relief may be granted, still leaves it entirely in the discretion of the Court whether the Court will give relief by Injunction or damages, and in so doing, has placed the Court very much in the same position as the Court of Chancery found itself after the passing of Lord Cairns' and Mr. Rolt's Acts, which enabled that Court to award the plaintiff compensation in lieu of, or in conjunction with, preventive relief. Sir G. Jessel discusses the effect of the former Act upon the practice of the Court in *Aynsley v. Glover*.⁴ He says: "It will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply. Although in terms

¹ 16 Ves. Jun., 342. And see *Jackson v. Duke of Newcastle*, 3 DeG. & J., 275, per Lord Westbury, whose statement of the law was adopted by Lord Hatherly in *Dent v. Auction Mart Co.*, L. R., 2 Eq., 238; cited in *Land Mortgage Bank v. Ahmedbhoy*

Habibbhoy & Kesouram Ramanand, I. L. R., 8 Bom. at p. 67 (1883).

² 5 Ch. App., 163 at p. 167.

³ *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252 (1888), at pp. 259, 260.

⁴ L. R., 18 Eq., 544.

so wide and so long, it never could have been meant, and I do not suppose it will ever be held to mean, that in all cases, the Court, of its own will and pleasure or at its own mere caprice, will substitute damages for Injunction. I am not now going, and I do not suppose any Judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion being a reasonable one should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word ‘extort’—to obtain a very large sum of money from a defendant merely because a plaintiff has a legal right to an Injunction; I think the enactment was meant in some sense or another to prevent that course being successfully adopted. There may be some other special cases to which the Act may be safely applied, and I do not intend to lay down any rule upon the subject.¹

“No doubt the jurisdiction of the Court of Chancery in question of relief by Injunction, &c., as stated by Lord Eldon in *Attorney-General v. Nichol*,² and explained by V C. Wood in *Dent v. Auction Mart Co.*,³ and by Sir G. Jessel in *Aynsley v. Glover*,⁴ is treated as existing where substantial damages would be given by a Court of law.⁵ But the Courts of this country have the jurisdiction

¹ *Land Mortgage Bank v. Ahmed-bhay*, I. L. R., 8 Bom. at pp. 70, 71 (1883), per Sargent, C. J.

² 16 Ves., 342.

³ L. R., 2 Eq., 238.

⁴ L. R., 18 Eq., 544.

⁵ See *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom. (1883), at p. 97. “An in-

junction can be granted wherever substantial damages could be awarded under the English Law,” per West, J.; and in *Aynsley v. Glover* at p. 555, Jessel, M. R., points out that the word ‘substantial, is not used in the sense of ‘enormous.’ If the injury complained of is of a material nature, the Court will grant an injunction

both of a Court of Law and Equity, and in the exercise the discretion will regard the 'materiality' of the injury in the sense in which that expression was used by Sir G. Jessel in *Smith v. Smith*,¹ and which, as pointed out by Fry, J., in *National Provincial Plate Insurance Company v. Prudential Insurance Company*,² means something more than is sufficient to give the Court jurisdiction to grant an Injunction and may depend on all the circumstances of the case."³ Acquiescence is one of those circumstances and its existence may induce the Court to give damages instead of an Injunction,⁴ or may preclude the recovery of even nominal damages.⁵

Section 54, clauses (b), (c) and (d) of the Specific Relief Act, states (subject to the discretion of the Court as provided by section 52) the cases in which a perpetual Injunction may be granted where the defendant invades or threatens to invade the enjoyment of property. In applying these provisions the Courts will do well to be guided by the decisions of the Court of Chancery in England which, it cannot be doubted, are the source from which the above provisions have been drawn.⁶ And the same general principles apply to the granting of a temporary, as to a perpetual, Injunction.⁷ But in following these

Holyoake v. Shrewsbury and Birmingham Railway Co., 5 Railw. Cas., 421; *Krehl v. Burrell*, 7 Ch. D., 551; 11 Ch. D., 146; *Holland v. Worley*, 26 Ch. D., 578; *Greenwood v. Hornsey*, 33 Ch. D., 471; otherwise where a money-payment is an adequate consideration; *Allen v. Ayres*, W. N., 1884, 242; *Holland v. Worley*, *supra*.

¹ L. R., 20 Eq., 500.

² 6 Ch. D., 768.

³ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom. at p. 484 (1894); so an injunction has been refused, though at the

same time it was held that the plaintiff was entitled to substantial damages; *Dhunjibhoy Courasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 264 (1888).

⁴ *Ranchhod Jamnadas v. Lallu Hari das*, 10 Bom. H. C. R., 95, 97 (1873); *Sayers v. Collyer*, 28 Ch. D., 103.

⁵ *Kelsey v. Dodd*, 52 L. J., Ch., 34.

⁶ *Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy & Kesuram Ramanand*, I. L. R., 8 Bom. at p. 67 (1883), *per* Sargent, C. J.

⁷ *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 279 (1881), *v. ante*, p. 7.

provisions the terms of the Indian Acts and Codes and the constitution of the Indian Courts must not be overlooked. Moreover as pointed out by West, J.,¹ it is not easy to reconcile all the English cases on the question of Injunction as opposed to damages : the question is one of degree, and the whole of the circumstances are seldom or never stated.

The Court has under that section jurisdiction to grant an Injunction in those cases where pecuniary compensation would not afford adequate relief. The expression "adequate relief" is not defined, but it is probably used in the sense in which Kindersley, V. C., used it in *Wood v. Sutcliffe*² as meaning "such a compensation as would, though not in *specie*, in effect place the plaintiffs in the same position in which they stood before." It does not, however, follow that in such cases a plaintiff is entitled as of right to an Injunction. Under the Specific Relief Act the Courts are given a discretion to grant or withhold an Injunction, as in England they have a discretionary power to award damages in lieu of an Injunction. In this view of the law, the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed, or even materially infringed, but also whether under all the circumstances of the case he ought to be granted an Injunction as the proper and appropriate remedy for such infringement.³ It must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury which is not capable of being fully estimated in pecuniary damages as respects the future as well as the past.⁴

¹ *Nandkishor v. Bhagubhai*, I. L. R., 8 Bom. at pp. 97, 98 (1883). 18 Bom. (1894), at p. 488, *per* Farran, J.

² 21 L. J., Ch. at p. 255.

³ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 24, (1869), and *see* at p. 25, where it is

⁴ *Ponnuswamy Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 6,

Even if it be difficult to suppose that pecuniary damages would not afford adequate relief, it should be shown that there is some standard for ascertaining them.¹ If there be no such standard and the case is otherwise a proper one, an Injunction will issue.² But it is not sufficient to prevent the granting of damages that the enquiry is one of difficulty and the result must to a great extent be matter of opinion, provided that there are *data* upon which experienced persons may form an estimate.³ Section 54, sub-section (b) of the Specific Relief Act, has application to such cases as are referred to in the Illustrations (h) and (i)⁴ to the section where there is no possible standard with reference to which the contemplated injury can be compensated rather than, for example, to a case of injury to property like a house occupied by its owner in danger of being deprived of its ancient light.⁵ As pointed out in the case last cited, the threatened disclosure of a confidential communication is an illustration of the class of cases referred to in section 54, clause (b).

As already observed the determination of the question whether relief by Injunction or by damages shall be granted depends upon the circumstances of each case. Some examples however of the application of these principles are here given. Thus it was held that the re-erection of

said, "further the injury is one of a constantly recurring kind and from the very nature of the easement (of water) it would be impracticable to estimate an adequate compensation in pecuniary damages as a proper substitute for the relief by injunction.

¹ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom. at p. 48.

² Act I of 1877 s. 54 cl. (b).

³ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, supra,

at p. 72.

⁴ And see *Ramanadhan v. Zamin-dar of Ramnad*, I. L. R., 16 Mad., 407, 409 (1893).

⁵ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom. (1894) at p. 489, *per* Farran, J. So the Court has directed an inquiry to ascertain the damage where the nuisance was an obstruction of the plaintiff's light: *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom. (1893) at p. 72.

his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, was an injury which could not be adequately redressed by an award of damages.¹ So also any act by which the control of light and air are taken out of the hands of the person entitled to them, or by which the access of light and air to the window of a dwelling-house is interfered with, is *prima facie* an injury of a serious character. When a defendant, therefore, without leave or license, took possession, of the plaintiff's window as completely as if he had blocked it up altogether. it was held that the injury was not reparable by damages.²

But when the plaintiff has no other than a pecuniary interest in the premises and would always have been satisfied with a liberal *solatium* for its violated rights, damages may properly be substituted for an Injunction.³

An obstruction to a right of way has been held to be a real and substantial inconvenience entitling to an Injunction.⁴ A forced joint occupation of an undivided dwelling-house of a Hindu family by an intruder, even though he be an owner, against the will of the resident Hindu coparcener, is an injury for which pecuniary damages would not be compensation.⁵ If the Court sees that the damage

¹ *Jamnadai, dec. v. Atmaram, dec.*, I. L. R., 2 Bom., 133 (1877); but the remedy depends upon the facts proved, *Ranchhod v. Lallu*, 10 Bom. H. C. R., 95 (1873); *Dhunjibhoy Cowarji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252 (1888); *The Land Mortgage Bank v. Ahmedbhoy*, I. L. R., 8 Bom., 71, 72; *Benoda Oomaree Dossee v. Soudaminy Dossee*, I. L. R., 16 Cal., 252 (1889); *Nasarbhai v. Munshi*, I. L.

R., 16 Bom, 533 (1891).

² *Nandkishor v. Bhagubha*, I. L. R., 8 Bom., 95 (1883).

³ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom, at p. 91 (1883).

⁴ *G. I. P. Railway v. Nowroji Pestanji*, I. L. R., 10 Bom., 390 (1885).

⁵ *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571, 573 (1871).

caused to the plaintiff by the act complained of is unsubstantial and trifling, it will hesitate upon imposing any obstacle in the way of a company, such as a Railway Company, serving the interests of the general public.¹ Where certain persons sued for an Injunction and for a declaratory decree as to their title to free access with their patrons to certain sacred shrines and to receive presents from their patrons unfettered by certain rules which had denied this title, it was held that they were entitled to such a decree as also to further relief by way of permanent Injunction as the defendants had threatened to invade their enjoyment of property, and the invasion was such that pecuniary compensation would not afford adequate relief.²

In a suit for a mandatory Injunction to remove a wall, it was said that if the plaintiff had quietly acquiesced in the building of it and had only objected on its completion, the Court should award him damages only.³

In the case of obligations arising from contract the Court will be guided by the rules and provisions contained in Chapter II of the Specific Relief Act relating to specific performance; and will, if the case be otherwise proper grant an Injunction where it would decree specific performance.⁴ It follows therefore that an Injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.⁵ And as a contract which is one for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced,⁶ so an Injunction will not be granted

¹ *G. I. P. Railway v. Nowroji Peshnaji*, 1. L. R., 10 Bom., 390, 394 (1885).

² *Kalidas Jivram v. Gor Parjaram Hirji*, 1. L. R., 15 Bom., 309 (1890).

³ *Ranchhod Jamnadas v. Lallu Haridas*, 10 Bom. H. C. R., 95, 97

(1873).

⁴ Act I of 1877, s. 54. As to the cases in which it will decree specific performance, v. *ib.*, ss. 12—30.

⁵ *Ib.*, s. 56, cl. (f).

⁶ *Ib.*, s. 21, cl. (a); see Illustrations to that clause; see Nelson, p. 163.

to prevent its breach.¹ When a contract comprises both an affirmative and a negative agreement, though the Court may be unable to compel specific performance of the first, it may yet grant an Injunction to perform the latter agreement.² And so when the defendant in England agreed with a Railway Company to serve the latter exclusively for four years in India and having come to India at the expense of the Company and served it for two years left its service for that of another employer, it was held that the plaintiff company were entitled to an interlocutory Injunction restraining the defendant from serving others, in that pecuniary damages would not adequately compensate the company for the defendant's breach of contract.³ A person may *contract* himself out of the remedy by Injunction as where he has agreed that the remedy in respect of the breach of an agreement shall be in damages; in which case the Court will not grant an Injunction.⁴ *Primi facie* any purely mercantile contract is one admitting of compensation in money.⁵ But, of course, it may be shown that under the particular circumstances the case is otherwise.

If money-compensation is the proper form of relief, it should obviously be compensation measured by the right infringed. It is only in respect of this that the plaintiff is competent to sue, and suing on a limited ground a plaintiff cannot be entitled to compensation on one greatly more extensive.⁶ In order that damages should be an adequate substitute for an Injunction, they must cover

Act I of 1877, s. 56, cl. (f).

¹ *Ib.*, s. 57.

² *Madras Railway Company v. Rust*, I. L. R. 14 Mad., 18 (1890); and see *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702, 711 (1894); *ib.*, I. L. R., 19 Bom., 784 (1895).

⁴ *Muncherji Furdoonji Mehta v.*

Noor Mahomedbhoy Jarrybhoy Purbhoy, I. L. R., 17 Bom., 711 (1893).

³ *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5, 7 (1881).

⁶ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 35, 93 (1883).

the whole area which would have been covered by the injunction and must comprise as well the damages for wrongful acts continued up to the time of trial as for those which had taken place before the issue of the writ.¹ If the wrongful act has come to an end before the trial, the Court has jurisdiction nevertheless to assess the whole of the damages accrued.² When an action is brought for an Injunction in respect of a threatened injury and no actual wrong has been committed by the defendant, the Court has no jurisdiction to give damages in substitution for such Injunction.³

(a) If the plaintiff be held entitled to damages, they must be given.

If the Court be of opinion that a plaintiff is entitled to relief, but that damages and not an Injunction is the appropriate remedy, it must award damages, or order an enquiry as to damages. It cannot dismiss the plaintiff's suit. In England, formerly, if a bill in Equity were dismissed, the plaintiff would have had his suit at law for damages. In this country, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy the appropriate remedy should be awarded.⁴ It is no objection to the grant of damages that they have not been specifically prayed for; they may be had under the prayer for general relief.⁵ Nor is the right to damages lost because performance has been obtained from the defendant before the suit comes to a hearing.⁶

(b) Assessment of, and enquiry as to, damages.

The parties either in the Original or Appellate⁷ Court may agree as to the amount which shall be payable as damages.

¹ *Fritz v. Hosbon*, 14 Ch. D., 543, 556, 557.

² *Ib.*

³ *Dreyfus v. Peruvian Guano Company*, L. R., 43 Ch. D., 316.

⁴ *Cañanji Harjivan v. Narsi Tri-cum*, I. L. R., 19 Bom., 764, 770 (1895).

⁵ *Catton v. Wyld*, 32 Beav., 266; *Betts v. Neilson*, 3 Ch. App., 441; *Stanley v. Shrewsbury*, 19 Eq., 616.

⁶ *Cory v. Thames Iron, &c., Company*, 11 W. R., (Eng.), 589.

⁷ *Benode Coomaree Dossee v. Sou-daminey Dossee*, I. L. R., 16 Cal. at pp. 262, 264 (1889).

Thus a sum may before judgment be agreed upon as satisfying the claim to which the plaintiff is entitled to as damages, it being left to the decision of the Court to deal with the question as to whether an Injunction should or should not be granted under the circumstances of the case; or a similar agreement may be entered into, leaving it to the decisions of the Court whether the plaintiff be entitled to any relief whether by Injunction or damages. If there be no agreement as to the amount of damages, the Court may itself award damages to the plaintiff, or order an enquiry as to damages.¹ An enquiry as to the damages will not, as leading to greater expense, be directed where there is no difficulty in assessing the damages, but the Judge will himself assess them at the trial.² Where enquiry as to damages would have been costly and in any case a decree for damages against the defendant would not have been of much value, the Court, under the particular circumstances of the case, awarded nominal damages only.³ Where no issue as to damages is framed or tried by the Lower Court, the Appellate Court may refer to the case back to the first Court for the trial of an issue as to damages under section 566 of the Civil Procedure Code;⁴ or may itself determine the same.⁵

Damages may be combined with a limited Injunction. (iii) Combination of damages and Injunction. Though this form of relief, which is expressly provided for by Lord Cairns' Act, is not mentioned by the Specific Relief Act, it may yet be awarded where the circumstances of the case so require.⁷ So where in a suit in respect of a

¹ *Ib.*, at p. 264.

² *Callianji Harjivan v. Narsi Tricum*, I. L. R. 19 Bom. at p. 770 (1895).

³ Kerr, *Inj.*, 41.

⁴ *Callianji Harjivan v. Narsi Tricum* I. L. R., 19 Bom., 764, 770 (1895).

⁵ *Benode Coomaree Dosee v. Sou-*

daminey Dosee, I. L. R., 16 Cal. at pp. 262, 264 (1889).

⁶ *Callianji Harjivan v. Narsi Tricum* I. L. R., 19 Bom. at p. 770 (1895); see Civ. Pr. Code, s. 566.

⁷ *The Land Mortgage Bank of India v. Ahmedbhoj Habibbhoj and*

nuisance the Original Court had granted such an Injunction the order was upheld by the Appellate Court, which observed as follows :—“ In the present case damages have been combined with a limited injunction. This particular combination of relief is not expressly provided for in the Specific Relief Act. But by section 52 of the Act, ‘ preventive relief is granted at the discretion of the Court.’ By section 54 ‘ an Injunction may be granted to prevent a multiplicity of judicial proceedings,’ which embraces as well repeated suits by the same plaintiffs as a series by different plaintiffs. On the other hand, section 56 says an Injunction cannot be granted ‘ when equally efficacious relief can certainly be obtained by any other usual mode of proceedings.’ A mere award of damages in this case would not prevent future claims for future injuries. Preventive relief may, therefore, properly be given, but being given to a certain extent, it appears that for the residual injury which, as the learned Judge below has found, is really small, damages will afford an efficacious relief—equally efficacious as relief, though not so efficacious in delivering over the defendants to the tender mercies of the plaintiff’s company. The judgment of Bramwell, B., in the *Stockport Waterworks Company v. Potter*,¹ shows that it is an important ingredient in the wrong occasioned by carrying an offensive business, if all possible remedial measures are not adopted. We think this Court may prescribe such measures as the condition of continuing a business, and give damages for the inevitable injury where these will suffice, though Rolt’s Act and Lord Cairns’ Act are not in force here. At any rate, the defendants, who are the persons to be affected by the injunction, may, if they dislike the combined remedy, avoid it by

Kesouram Ramanand, I. L. R., 8 Bom.
at pp. 77, 91 (1883).

¹ 3 H. L., 326; 31 L. J. Ex., 16.

submitting to an injunction which will apparently close their factory. If the defendants submit, the plaintiffs' company cannot complain that in addition to damages it obtains a further discretional relief, leaving it to the necessity of further litigation only should a reasonable use of their premises be exceeded in future by the defendants. The modified conditional injunction framed by the learned Judge below is calculated in its intention to provide the requisite remedy in this case by reducing the annoyance caused by the working of the mill to such a moderate and perhaps irreducible minimum as will be fairly compensated by damages for the premises occupied by the plaintiff's company affected by it. It will only be necessary to mould the wording so as distinctly to provide against any increase of smoke, cotton, fluff or noise of machinery beyond what subsisted at the date of the decree (see *Goldsmid v. Tunbridge Wells Improvement Commissioners*),¹ and to add that the injunction does not free the defendants from any necessity they may be under of working always so as to cause the least annoyance reasonably possible to the occupants of the premises with respect to which the decree is made. It may be that inventions will be made by which the now inevitable annoyance may be easily diminished; and should a right then arise for the neighbours to a working of the mill so as to be less offensive, they ought not to be precluded from that right by an injunction intended for their benefit.

§ 34. The Court may refuse relief or give relief either by Injunction, or damages, or by a combination of both,

¹ L. R., 1 Ch., 349 S. C., 35 L. J., Ch., 382.

* *The Land Mortgage Bank of India v. Ahmedbhai Habibbhai and Kesoram Ramanand*, I. L. R., 8 Bom. at pp. 91—93 (1883); it has however also been held that, if the

title to an injunction depends upon the fact that there is no proper compensation in damages, the latter will not be granted in addition to the injunction; *Eardley v. Granville*, 24 W. R. (Eng.), 528.

If relief be given it must be of one or other of the preceding kinds.

but it cannot compel a plaintiff, who is entitled to its aid to accept some other form of relief. So in the under-mentioned case¹ the plaintiff complained that the defendants intended to build so as to obstruct the passage of light and air through an ancient window in his house, and render a room therein unfit for use, and prayed for a perpetual Injunction restraining the defendant from so building. The Subordinate Judge granted the Injunction as prayed. The defendants appealed to the Joint Judge who amended the lower Court's decree by ordering the removal of the Injunction, and directing in its stead a new window to be opened by the defendant in the plaintiff's house to the east of the window in question, the light into which would not be interfered with by the defendant's house. The High Court on appeal reversed this decree, holding that the plaintiff had an absolute and indefeasible right to the easement which he had acquired, and the only possible question was whether an Injunction or damages was the appropriate remedy under the circumstances of the particular case, and that the form of relief which had been given by the Joint Judge to the plaintiff was one which the latter could not be compelled to accept.

¹ *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 674 (1889).

CHAPTER III.

PRACTICE RELATING TO INJUNCTIONS.

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| <p>§ 35. MEANS BY WHICH AN INJUNCTION IS OBTAINED.</p> <p>(i) Injunctions are granted upon suit ;</p> <p>(ii) In urgent cases by motion <i>ex parte</i> without notice, and before, or after appearance ;</p> <p>(iii) In other cases by motion for a rule <i>nisi</i>, or upon notice before, or after appearance.</p> <p>§ 36. INTERIM ORDERS.</p> <p>§ 37. INJUNCTION UPON TERMS.</p> | <p>§ 38. EVIDENCE IN SUPPORT OF APPLICATION.</p> <p>§ 39. HEARING OF APPLICATION.</p> <p>§ 40. DISCHARGE, VARIANCE & DISSOLUTION OF INJUNCTION.</p> <p>§ 41. APPEAL IN THE MATTER OF INJUNCTIONS.</p> <p>§ 42. REFERENCE, REVISION & REVIEW IN THE SAME MATTER.</p> <p>§ 43. COSTS.</p> <p>§ 44. ENFORCEMENT OF ORDERS & DECREES GRANTING INJUNCTIONS</p> <p>§ 45. LIMITATION.</p> |
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§ 35. The means by which an Injunction is obtained as also all other rules of practice governing the issue of this form of relief, constitute a portion of the general law relating to the procedure to be followed in civil suits, and are to be sought for in the rules and practice of the High Courts and the provisions of the Civil Procedure Code. The rules relating to the obtaining of temporary Injunctions only are dealt with in this Chapter. Perpetual Injunctions are obtainable by decree made at the trial, and the practice relating thereto is the same as that which governs the making of decrees granting other than specific relief.

An Injunction will, as already observed, only be granted upon, or in, a suit praying for that or other relief. There must be a pending action in which the Injunction may be

Means by which an Injunction is obtained.

(i) Injunctions are granted upon suit.

obtained :¹ though possibly in extremely urgent cases the Court may, in accordance with the English practice, grant an Injunction before the filing of a plaint upon the plaintiffs undertaking to institute a suit forthwith.² In actions for an Injunction, as in other actions, the rule applies that all persons interested in the subject-matter should be made parties to the proceeding on either the one or the other side of the record.³ As a general rule, an Injunction should be specifically prayed for when the obtaining of that relief is a substantial object of the action ; though leave will be given to amend the plaint by adding a prayer for an Injunction and an Injunction may be granted at the hearing of the cause though not prayed for in the plaint.⁴ So after decree parties to the suit or persons who have or may come in under the decree will be restrained from taking proceedings contrary to the decree or violating its spirit without any prayer for an Injunction.⁵ When the plaint has been registered a summons is issued to the defendant to appear and answer the plaintiff's claim.⁶

(4) in urgent cases by motion ex parte without notice, and before, or after appearance.

As a general rule, notice of an application for an Injunction must be given to the opposite party. But in cases where the object of granting the Injunction would be defeated by delay, in urgent cases of threatened

¹ v. ante, p. 41; High, Inj., § 1566.

² v. ante, p. 64, n. (3).

³ § 17, ante; Spelling's Extraordinary Relief, § 970; High, Inj., §§ 1547—1564; and see as to s. 30 of the Civ. Pr. Code; *Baiju Lal Parbatu v. Bulak Lal Pathuk*, I. L. R., 24 Cal., 385 (1897); right to sue as constituted attorney, *Nemava v. Desai Trappa*, I. L. R., 15 Bom., 177 (1890); Injunctions against Municipal bodies, *Chabildas v. Municipal Commissioner of Bombay*, 8 Bom. H. C. R. 55 (1871); *Hormasji Karsetji*

v. Peddar, 12 Bom. H. C. R., 199 (1875); *Municipal Commissioners for Town of Madras v. Branson*, I. L. R., 3 Mad., 201 (1881); *Public Trustees, Shepherd v. Trustees of Port of Bombay*, I. L. R., 1 Bom., 132, 477 (1876). As to tenant's and landlord's respective rights of action, see *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 87, 88 (1883).

⁴ *Joyce, Inj.*, 1262, 1263; *Kerr, Inj.*, 612; Civ. Pr. Code, ss. 50 (e), 53-

⁵ *Joyce, Inj.*, 1263.

⁶ Civ. Pr. Code, Ch. VI.

mischief and in cases where notice of an intention to apply for an Injunction might lead to the commission of the act before the time for hearing a motion on notice, an Injunction may be granted *ex parte* before or after the appearance of the defendant to the suit.¹ In very pressing cases an Injunction may be applied for *ex parte* before service of the writ of summons.²

An Injunction is granted *ex parte* and without notice to the opposite party only in cases where considerable mischief might ensue, if the issue of the process were delayed, until notice should be given to the party against whom it is sought. The power to issue an *ex parte* Injunction no doubt exists but the greatest care should be employed in its exercise. There may be instances where the injury is so great that an *ex parte* Injunction is necessary but the Court should, if possible always require notice, however short to be given.³ "Such an Injunction on the application of one party, and without previously giving to the person to be affected by it the opportunity of contesting the propriety of its issuing, is a deviation from the ordinary course of justice, which nothing, but the existence of some imminent danger to property, if it be not so granted, can justify. A case, therefore, of irremediable mischief impending must be made out. By this is certainly not meant necessary and inevitable destruction, but great and serious danger not capable of being averted probably, if daily be interposed. The Court with a proper jealousy has guarded the establishment of this anomalous practice by a very salutary

¹ Civ. Pr. Code, s. 494; Joyce, Inj., 1261; Kerr, Inj., 615, 616, but in the absence of pressing necessity it is improper to do so. Spelling *op. cit.*, § 1016.

² *H. v. H.*, 1 Ch. D., 276; *Colebourne v. Colebourne*, ib., 680; *Brand v. Mitson*, 24 W. R., (Eng.), 524.

³ *Hari v. Secretary of State for India*, I. L. R., 27 Bom., 424, 451 (1903).

rule which requires that a full communication should be made to the Court, which grants the Injunction, of all material facts which might influence its decision." As observed by Sir Lawrence Peel, C. J., in the case already cited, the Courts have guarded the practice of *ex parte* Injunctions by the rule which requires that all material facts should be disclosed. So where a motion was made on a partial statement of the facts and the dissolution of the Injunction was resisted on a case not then made, it was said that, if the Court allowed this, it would encourage the suppression of important facts and the Court dissolved the Injunction, and held that where a fact is not communicated which would, if communicated, have prevented the issue of an *ex parte* Injunction, the Injunction, will be dissolved, even though a fraudulent suppression be not made out.² It is a general rule, therefore, that on an *ex parte* application for an Injunction the material facts must be fully and fairly stated to the Court.³ If the Court be of opinion upon an application *ex parte* that the case is not so urgent as to require its immediate interference, it will either grant a rule *nisi*, or order notice of the application to be served on the defendant.

(iii) in other cases by motion for a rule *nisi*, or upon notice before, or after appearance

In other than urgent cases justifying the issue of an *ex parte* Injunction, application should be made after the filing of the plaint and before, or after, appearance of the defendant for a rule *nisi* which is then served upon the defendant calling upon him to show cause why an Injunction should not be awarded, when, if no cause be shown,

¹ *Freeman v. McArthur*, 2 Taylor & Bell, R., 10, 25, per Peel, C. J., (1851). "A very mischievous and oppressive use may be made of this writ, and it is our duty to narrow its issue *ex parte* to the cases in which it is alone fitting that it should so

issue." *ib.*, at p. 26.

² *Freeman v. McArthur*, *supra*, at pp. 26, 28; see also *Sreemutty Sochorurry Dossee v. Hurree Kisto Roy*, 2 Boulnois, R., 62 (1859).

³ *Joyce, Inj.*, 1263, *et ibi casus*.

the rule is made absolute ; or, as is more commonly done, the opposite party should be served with notice of motion for a particular day. In cases where danger is imminent (though not so imminent as to justify the issue of an *ex parte* Injunction), leave will be given before the appearance of the defendant upon filing the plaint to serve a notice of motion or a short notice.¹ If the plaintiff has not a case for an *ex parte* Injunction, or for an application to serve a short or other notice of motion, then the motion for the Injunction must be brought on in the same way as other ordinary motions, namely, on the day appointed by the Court for hearing motions. After the defendant has appeared, the general rule is that an Injunction can only be moved for on notice of motion, but if the threatened danger is imminent, and would be irremediable, the Court will grant an Injunction without notice of motion. The rule laid down by the Civil Procedure Code is that the Court must in all cases, except where it appears that the object of granting the Injunction would be defeated by the delay, before granting an Injunction, direct notice of the application for the same to be given to the opposite party.² So where a Court made an order granting a temporary Injunction under section 492 of the Civil Procedure Code without directing notice of the application for an Injunction to be issued to the other side and its order directing stay of sale of property in execution was passed *ex parte* without the other side being given an opportunity to show cause, it was held that the order was irregular.³

¹ Joyce, *Inj.*, 1261, 1262; Kerr *Inj.*, 614. [In *Maynard v. Fraser*, cited in Joyce's *Inj.*, 1262, the Court gave leave to serve a notice of motion before the Bill has been filed upon the undertaking of the defendant that the Bill should be on the file when

service was effected.]

² *Id.*

³ Civ. Pr. Code, s. 494 ; corresponding with s. 95, Act VIII of 1859 ; this section applies to H. C. ; see Kerr, *Inj.*, 614—617.

⁴ *Amolak Ram v. Sahib Singh*,

Where an Injunction is granted without notice, the party aggrieved may apply either to have it discharged under section 496 of the Civil Procedure Code, or he may appeal.¹ But the former appears to be the proper course to be taken in such a case. No appeal lies from an order refusing to issue an Injunction without issuing notice to the opposite party.² Notice of motion should be served on all parties interested in the question raised by the motion. Unless where substituted service is ordered, the notice is served personally, and may be served on the solicitor after the appearance of the party to the action. If upon the hearing of the motion it appears that there has been no proper service, or that service of notice has not been made on a party entitled thereto, the Court will either dismiss or adjourn the hearing of the application. The notice of motion should be entitled in the cause in which it is made and should state on whose behalf the motion is to be made, the day on which the motion is to be made, and the nature of the order asked for. Costs may be given though not asked for by the notice.³

Interim orders. § 36. Instead of issuing an Injunction in the first instance the Court may grant an *interim* order by which the defendant is restrained until after a particular day named, liberty being given to the plaintiff to serve notice of motion for an Injunction for the day before such day. *Interim* orders are temporary *ex parte* Injunctions, or *interim* restraining orders in the nature of Injunctions, which are granted when the plaintiff, not showing quite a case for an *ex parte* Injunction, without more, shows a

I. L. R., 7 All., 550 (1885); and see *Joynarain Geeree v. Shibpersad Geeree*, 6 W. R., 108, 109 (1886); *Mun Mohinee Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870).

¹ *Amolak Ram v. Sahib Singh*,

I. L. R., 7 All., 550, 552 (1885).

² *Luis v. Luis*, I. L. R., 12 Mad., 186 (1888).

³ *Joyce*, Inj., 1284; *Kerr*, Inj., 614—617.

case for giving short notice of motion for an 'Injunction, and for protection in the meantime. The *interim* order is therefore an Injunction or restraining order, obtained *ex parte*, to be in force until after a day named, with liberty (if required) to serve a notice of motion for an Injunction on the day before that day, when the question of the right to an Injunction would be disposed of, on the notice of motion.¹ *Interim* orders are generally granted upon an *ex parte* application for such order with liberty to serve notice of motion,² or upon a motion for a rule *nisi*.

An *interim* Injunction may be applied for on the presentation of the plaint.³ Where this had been done and Counsel appeared for the defendants and it was objected that, the application being for an *interim* Injunction, the defendants could not be heard, the Court, under the particular circumstances, considered that the defendants should be heard.⁴

Though an application for an *interim* Injunction may be rejected, the Court may grant a rule *nisi* for an Injunction in the terms as prayed.⁵ An *interim* order and a rule *nisi* may be, and ordinarily are, granted at the same time.⁶ And upon the hearing of the rule the *interim* order as well as the rule will either be discharged or the rule will be made absolute.⁷ In the event of an offer of compromise the rule and *interim* Injunction may be ordered to stand over for a fixed time, upon the expiry of which

¹ Joyce, Inj., 1304.

² Kerr, Inj., 625.

³ *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5, 6 (1881); *Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, I. L. R., 17 Bom., 711, 714 (1893).

⁴ *Haji Abdul Allarakhi v. Haji*

Abdul Bacha, supra.

⁵ *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5, 7 (1881).

⁶ *Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, I. L. R., 17 Bom., 711, 714 (1893).

⁷ *ib.*, at p. 717.

time the rule will either be made absolute or the *interim* Injunction and rule will be discharged.¹

Injunction
upon terms.

§ 37. An Injunction may be, and often is, given or withheld upon certain terms or conditions only, of which the most frequent is the usual undertaking as to damages. In doubtful cases where damage may be occasioned to the defendant, in the event of an Injunction or *interim* restraining order proving to have been wrongly granted, the Court will require the plaintiff as a condition of its interference in his favour to enter into an undertaking to abide by any order it may make as to damages. So also the Court may require the defendant to enter into terms as a condition of withholding an Injunction.²

Section 403 of the Code enacts that the Court may by order grant an Injunction under that section on such terms as to the duration of the Injunction, keeping an account, giving security or otherwise, as the Court thinks fit. So a plaintiff's application for an Injunction that the defendant be restrained from taking possession under a decree of an undivided moiety of a family dwelling-house was granted on the terms that he should offer in his plaint by an amendment to be made for that purpose, or should otherwise undertake, to pay the defendant, in the event of his title being established, such compensation for being kept out of possession *pendente lite* as the Court might think fit.³ And in a suit to restrain a threatened ejectment of the plaintiffs from a dock belonging to the defendants, an Injunction was in the Court of first instance granted restraining the defendants until the hearing of the cause from bringing any suit for the recovery of possession of the dock or taking any steps to recover possession on the plaintiff's

¹ *Muncherji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, I. L. R., 17 Bom., 717.

op. cit., §§ 1032, 1033.

³ *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571, 574 (1871).

² Kerr, Inj., 627, 628; Spelling

undertaking, until further order, to pay into Court monthly a certain sum to the credit of the cause and undertaking to abide the order of the Court as to the fair amount of rent to be paid to the defendants for the use of the dock, and to pay any damages which the defendants might sustain by reason of the order, and further to give over to the defendants full and complete possession of the dock on a date named.¹ Upon appeal the temporary Injunction in the last cited case was modified and the undertaking varied. The Court refused to restrain the defendants from bringing a suit to recover possession, but restrained them from executing any decree which they might obtain therein until the plaintiffs should have had a reasonable time within which to complete the repairs of and to remove a vessel of theirs which was in the dock at the date of the suit, and, upon the plaintiffs undertaking to give the defendants an immediate decree for possession upon a plaint for that purpose being filed, the defendants were restrained from executing such decree and from ejecting the plaintiffs from, or interfering with the plaintiff's possession of, the dock, or interfering with the plaintiff's vessel until a date named.² And so an Injunction was granted, until the hearing, restraining the defendant from further proceeding with a building upon the terms of the plaintiff submitting to obey any order the Court might make as to loss or damage that might be caused to the defendant by making such order.³ And in a case of breach of contract of personal service the Court granted a temporary Injunction restraining the defendant from serving others than the plaintiff on the terms that the latter should consent to

¹ *Moran v. River Steam Navigation Company*, 14 B. L. R., 362, 361 (1875).

² *ib.*, at p. 366.

³ *Ratanji Hormasji Bottlewalla v.*

Edalji Hormasji Bottlewalla, 8 Bom. H. C. R., 181, 184 (1871); *Chandra Nath Pal v. Sree Gobind Chowdhury*, 6 C. W. N., 306 (1906).

retain him in his employ.¹ Where a suit for an Injunction was dismissed and, pending the appeal, the plaintiff applied for a temporary Injunction under section 492 of the Code, the Appellate Court granted such Injunction upon the terms that security should be given by the applicant.²

The undertaking is ordinarily given by Counsel or pleader on behalf of the party for whom he appears,³ or by the party appearing in person and forms part of the order of Injunction.⁴

Evidence in support of application.

§ 38. In the case of every application for an Injunction it must be proved either (as is usually the case) by affidavit or otherwise⁵ that sufficient grounds exist for the grant of the relief claimed. Evidence must be offered and that evidence must be sufficient to warrant the exercise of that extraordinary jurisdiction. So where no witness was examined and the only verified document on the record was the plaint, an Injunction which had been granted was dissolved.⁶ The defendant's admission may be sufficient.⁷ In a suit praying for an Injunction restraining the defendant from interfering with the plaintiff's possession of certain land, the plaintiff in the plaint alleged obstruction by the defendant. It was not denied by the defendant in his written statement or put in issue at the hearing: *held* that it might be presumed that the

¹ *Madras Railway Company v. Rust*, I. L. R., 14 Mad., 18, 22 (1890).

² *Kirpa Dayal v. Rani Kishori*, I. L. R., 10 All., 80, 83 (1887).

³ *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 361, 366 (1875); *Chandra Nath Pal v. Sree Gobind Chowdhury*, *supra*.

⁴ *Kerr*, Inj., 628.

⁵ Civil Procedure Code, s. 492; as to the practice relating to affidavits *v. ib.*, Chap. XVI.

⁶ *Jaggivan Nanabhai v. Shridhar*

Balkrishna Nagarkar, I. L. R., 2 Bom., 256 (1877). Nor will an Injunction be granted on a mere general affidavit as to the truth of the facts stated in the Bill: *Gillroy's Appeal*, 100, Pa. St. 5 (Amer.)

⁷ *Goluck Chunder Goocho v. Mohin Chunder Ghose*, 13 W. R., 96 (1870) *Joyce*, Inj., 1288, or it may go a long way to remedy defects in the plaint. *Kunj Behari v. Keshav Lall*, I. L. R., 28 Bom., 567, 572 (1904).

defendant did not deny the fact of obstruction.¹ It is in general necessary that a plaintiff should swear positively to his title. To obtain an Injunction, in a case in which the plaintiff's right depends upon his title, he should set out his title particularly.

In applications for *ex parte* Injunctions particular care must be taken that all material facts are fully and fairly stated to the Court;² and the applicant should state not only the time at which he first became aware of the threatened injury, but also the necessity which exists for dispensing with the usual notice.³

An Injunction will not be granted on a mere allegation of irreparable injury. The facts on which the allegation is founded must appear. But the omission of the bare charge of irreparable mischief would not be a defect in a plaint or affidavit otherwise good, because the Court must be satisfied from a statement of the grievance that the injury will be irreparable and it is enough if the Court can discover this from the facts alleged. The same requirements as to clearness and certainty must be observed in setting forth the facts from which the intent of the defendant to commit or to continue the commission of the wrong complained of is to be inferred.⁴

In all cases there must be proof of an intention to waste, damage or alienate or to commit some other threatened injury.⁵ So a mere allegation that the defendant wishes

¹ *Apaji Patil v. Apa*, I. L. R., 28 Bom., 735 (1902).

² *Joyce, Inj.*, 1293; *Spelling op. cit.*, § 994.

³ *v. ante* p. 156.

⁴ *Kerr, Inj.*, 618; *Joyce, Inj.*, 1294.

⁵ *Spelling, op. cit.*, §§ 991, 993; *High, Inj.*, § 1581. In *Kunj Behari v. Keshav Lall*, I. L. R., 28 Bom., 567, 572 (1904), *Jenkins, C. J.*, said to an argument that there was no allega-

tion of obstruction "Mofussil pleadings are not construed strictly and though the plaint is imperfect as a statement of the plaintiff's case, we think obstruction is involved."

⁶ See p. 101 *ante* and cases there cited and *Chabildas Lallubhai v. The Municipal Commissioner of Bombay*, 8 Bom. H. C. R., 85 (1871) [wrong discontinued before suit; mere vague apprehensions that wrong may

to realize debts by bringing actions in Court without proof of an intention to waste, damage or alienate the property in suit is clearly insufficient.¹ But where proof has been given of actual or threatened injury, the circumstance that there is a contradiction on the facts as alleged by the applicants and the opposite party is not in itself a bar to the grant of relief.² There should be no variance between the allegations in the pleadings or the aid sought thereby and the affidavits or evidence given in support of them.³ The plaint should set forth clearly and specifically the matters relied upon to entitle a plaintiff to extraordinary relief, since inferences which do not necessarily flow from the allegations will not be indulged to aid the pleader. In particular the well established rule that fraud must be charged specifically and not in general terms, is strictly enforced where an action for an Injunction is based upon alleged fraud.⁴ The object of any system of pleading is that each side may be made fully aware of the questions which are about to be argued in order that each may bring forth evidence appropriate to the issues.⁵

be recommended insufficient for Injunction]. The Court will not interfere when the injury is temporary and trifling; *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 67 (1883); *Ponnusawmi Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 24 (1869); *G. I. P. Railway v. Nowroji Pestanji*, I. L. R., 10 Bom., 394 (1885); and will consider the likelihood of its arising or continuing: *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, *supra*, 68, 69; but it was not intended by the Specific Relief Act that a man should not have an Injunction, unless his property would otherwise be practically destroyed, if the Injunction were not granted; *Yaro v. Sana-*

ullah, I. L. R., 19 All., 259 (1897).

¹ *Prosunno Moyee Dossee v. Wooma Moyee Dossee*, 14 W. R., 409 (1870); and see *Roy Luchmiput Singh Bahadoor v. Secretary of State for India*, 11 B. L. R., App. 27—28 (1873). Such proof was held to have been given in *Chandidat Jha v. Padmanand Singh Bahadur*, I. L. R., 22 Cal., 459, 466 (1895).

² *Moran v. River Steam Navigation Co.*, 14 B. L. R., 352, 357 (1875); but see *De Tastet v. Bordenave*, Jac., 516; *M'Curdy v. Noak*, 17 L. J. (N. S.), Ch., 165.

³ *Kerr*, Inj., 618.

⁴ *Spelling*, *op. cit.*, § 982.

⁵ *Sayad Muhammad v. Fattah Muhammad*, I. L. R., 22 Cal., 324 (1894).

A plaintiff must succeed not only *secundum probata* but also *secundum allegata*, but a too technical view must not in this country be taken of the pleadings. So in a case for an Injunction in respect of a right of way where the plaint alleged that a certain space had been set apart by the owners for the residents of a lane, and used by them in common, for purposes of recreation, and the relief to which the evidence showed that the plaintiff was entitled, was, in effect, the same as that which he prayed for, *viz.*, to have the space which the defendant had enclosed with a wall left unobstructed; it was held that it would be taking too technical a view of the pleadings to hold because the plaintiff alleged that the place was set apart for recreation, and the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation-purposes) that the plaintiff ought, on that account, to fail altogether and be left to a fresh action. If the defendant had been misled or induced to refrain from calling evidence to rebut the plaintiff's case, this course might be adopted; but in the suit in question the defendant had called evidence which, in the main, coincided with that of the plaintiff.¹

Affidavits which must be intituled in the cause or matter in which they are sworn are made by the plaintiff himself or anybody acquainted with the facts. They should be confined to such facts as the witness is able of his own knowledge to prove except on interlocutory motions in which statements as to belief are admissible,

Ranchordass Amthabhai v. Maniklal Gordhandass, I. L. R., 17 Bom. 648, 655, 656 (1890). See Kerr, Inj., 624, *et ibi causas*; and the Indian decisions cited in Field's Ev., pp. 358—369. So with regard to temporary

Injunctions it has been held that the case with the grounds for relief must be made by the pleadings, and their scope cannot be enlarged by the affidavits filed. Spelling, *op. cit.*, § 995.

provided that reasonable grounds thereof are set forth.¹ The Court may take notice of matters given in evidence in previous proceedings in the cause and may refer to notes made by the Court on such occasions. But after the motion is opened no new evidence can be offered, except with the leave of the Court.²

Hearing of
application.

§ 39. If sufficient *prima facie* evidence of a case for an Injunction is produced the Court will grant the Injunction, unless the defendant produces evidence rebutting that *prima facie* case. But, if the plaintiff's equity is falsified by the affidavits on the other side, the Court will not grant the Injunction.³ The Court may require the plaintiff or defendant to enter into terms as a condition of granting or withholding an Injunction.⁴ The Court will grant an interlocutory Injunction upon the evidence before it, and will confine itself strictly to the immediate object sought, abstaining as far as possible from prejudging the question in the cause.⁵ In dealing with an application the Court will be governed by considerations as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the Injunction, and will take care so to frame its order as not to deprive either party of the benefit he is entitled to, if, in the event, it turns out that the party in whose favour the order is made shall be in the wrong. The burden lies upon the plaintiff, as the person applying for the Injunction, of showing that his inconvenience exceeds that of the defendant.⁶

In some cases the motion for a temporary Injunction is treated as a trial of the action and the hearing of the

¹ Civ. Proc. Code, s. 196; Kerr, *luj.* 618-622; Joyce, *Inj.*, 1289, *et seq.* see *Bird v. Lake*, 1 H. & M., 111.

² *Kerr, luj.* 618-622.

³ Joyce, *Inj.*, 1295, 1296.

⁴ *v. ante*, § 37.

⁵ *v. ante*, p. 98.

⁶ Kerr, *Inj.*, 25, 26.

cause is not further proceeded with. The Injunction may by consent be made perpetual on the motion. In cases where relief, additional to that by Injunction, is sought, such a course is not generally feasible, and the trial proceeds, when upon judgment the Injunction is made permanent or dissolved. If the defendant does not offer to submit to the Injunction and pay all the costs up to that time or if, while submitting to the Injunction, he refuses to pay costs or to give the plaintiff any of the other relief to which he is entitled the plaintiff is entitled to bring the action to trial and will have his costs.¹ If upon judgment the action is dismissed any Injunction which may have been granted goes as a matter of course,² though the plaintiff may bring another action for the same purpose under a different state of circumstances or upon new facts.³ An Injunction which has been granted upon an interlocutory application is superseded by the judgment in the action. If it is intended that it should remain in force and become a perpetual Injunction it must be expressly continued at the hearing of the cause. Injunctions are made perpetual at the trial for the purpose of protecting the plaintiff, when his right has been established in the action. In order to entitle a man to an Injunction at judgment in the action, it is not absolutely necessary that he should previously have made an interlocutory application for one; and he is at liberty to claim an Injunction, although he may have previously failed to obtain one or to support it when obtained. An Injunction will be granted on judgment in the action whenever it is

¹ *ib.*, § 24.

² *Ante*, pp. 73, 70, Joyce, Inj., 1302; High., Inj., § 1476. See *Kalyanbhai Dipchand v. Ghanesham Lal Jadunathji*, I. L. R., 5 Bom., 29, 31 (1880).

³ *Mayor of Liverpool v. Chorley Waterworks Company*, 2 D. M. & G., 852; *Castelli v. Cook*, 7 Ha., 89, 99; *Atty.-Gen. v. Sheffield Gas Company*, 3 D. M. & G., 304, 341. Spelling, *op. cit.*, §§ 1024, *et seq.*

necessary for the purposes of complete justice, although it is not claimed in the writ of summons.¹ Injunctions are continued at the hearing either provisionally (as pending enquiries or accounts) or permanently.² If instead of an Injunction the plaintiff be held entitled to damages they must be given; the Court either itself assessing the damages, or directing an enquiry as to the damages.³ The Court may direct an enquiry though such an enquiry may be difficult and to a great extent matter of opinion, provided that there are data upon which experienced persons may form an estimate.⁴

Discharge,
variance, and
dissolution of
Injunction.

§ 40. A marked feature of temporary Injunctions as distinguished from those which are final or perpetual is that the former are liable to be dissolved upon sufficient cause shown at any stage of the proceedings after, or perhaps even before, the coming in of the answer. Any order for an Injunction which has been obtained may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order.⁵ The application to dissolve an Injunction should be made on motion in open Court at any time before the hearing of the cause and in the cause in which it was granted.⁶ and before the Court by which the Injunction

¹ Joyce, *Inj.*, 1314, 1318; Kerr, *Inj.*, 637, 638. Under modern systems much less importance is attached to the mere form of the prayer than formerly, where the facts are properly stated and show a clear right to preventive relief. Spelling, *op. cit.*, § 998. As to the terms of the orders upon applications for interlocutory Injunctions, see Joyce, *Inj.*, 1311.

² Joyce, *Inj.*, 1316.

³ *v. ante*, § 33.

⁴ *The Land Mortgage Bank of India v. Ahmedbhai Habibbhai*, I. L.

R., 8 Bom., 72 (1883).

⁵ Civ. Pr. Code, s. 496; corresponding with s. 93, Act VIII of 1859; this section applies to H. C.; see generally as to the Dissolution of Injunctions, Kerr, *Inj.*, 631-636; Joyce, *Inj.*, §§ 1264-1280; High, *Inj.*, 1467-1546; 1598-1618; Hilliard, *Inj.*, 103-171.

⁶ Joyce, *Inj.*, 1265; *Freeman v. McArthur*, 2 Tay. & Bell, R., 25 (1851); *Sreemutty Sohochurry Dossee v. Hurree Kisto Roy*, 2 Boulnois, 62 (1859); Kerr, *Inj.*, 631.

was granted,¹ unless the cause has been transferred when the application may be made to that Court to which the cause has become attached.⁴ A temporary Injunction may be dissolved at any time before judgment in the action upon notice to the plaintiff of motion for that purpose by the defendant as also to other parties, if any, interested with him as co-defendants.³

If the allegations which constitute the equity of the plaintiff's case are falsified by affidavits on the other side, or if the Court shall be of opinion that the Injunction was improperly granted, it will order the Injunction to be dissolved. The Injunction will either be continued or dissolved according to the merits as disclosed by the pleadings and the preponderance of the evidence.⁴ A plaintiff cannot, on the motion to dissolve, sustain the Injunction on grounds not raised by the plaint, nor can he make a new case.⁵

The general rules of pleading an evidence apply both to applications for the grant and dissolution of Injunctions. The answer to the application must respond clearly and directly to each and all of the material allegations of the plaintiff's case. A mere formal or technical denial is not sufficient. In particular where fraud is alleged, the Court will not be satisfied with a general or evasive answer. The answer should deny facts not inferences. An Injunction will not be dissolved, unless the plaintiff's equity

¹ *Paredes v. Lizardi*, 9 Beav., 490 and see *Hammond v. Smith*, 15 L. J., Ch., 40; *Joyce, Inj.*, 1277.

² *Sturgeon v. Hooker*, 1 DeG. & S., 484.

³ *Kerr, Inj.*, 631; *Service v. Castaneda*, 9 Jur., 387.

⁴ *Kerr, Inj.*, 631; *Spelling op. cit.* § 1013, *Sanster v. Foster*, Cr. & Ph., 302; *Jagjivan v. Shridhar*, I. L.

R., 2 Bom., 252; 255—257 (1877); *Freeman v. McArthur*, 2 Tay. & Bell, R., 25 (1851); *Sreemutty Sohochurry Dossee v. Hurree Kisto Roy*, 2 Boulnois, 62 (1859).

⁵ *Burdett v. Hay*, 4 D. J. & S., 41; *Barker v. North Staffordshire Railway Co.*, 5 R. Ca., 401, cited in *Kerr, Inj.*, 631.

and the facts on which it is founded are explicitly denied by the positive answer.¹

When an *ex parte* Injunction has been obtained, and a fact has not been communicated which would, if communicated, have prevented, the issue of an *ex parte* Injunction, the latter will be dissolved, even though a fraudulent suppression be not made out;² and this will be done though an Injunction would have issued, if made on notice, even upon a communication of the fact suppressed.³ And when an Injunction is obtained *ex parte* on facts of which a material one is false, the Injunction will be dissolved, although by the affidavits filed when the motion for dissolution is made, there appear sufficient grounds for granting it.⁴ The plaintiff will not be heard to say that he was not aware of the importance of the facts so mis-stated or concealed,⁵ or that he had forgotten them.⁶ But the mis-statement or suppression must be such as to lead the Court to grant the Injunction.⁷

A party who has obtained an *ex parte* Injunction which is afterwards dissolved on the ground of concealment of material facts is not precluded from making an application for another Injunction on the merits.⁸ And the Court when dissolving an Injunction on these grounds will not prejudice any question which may be agitated on another motion or notice.⁹ So also if an Injunction made

¹ Spelling, *op. cit.* §§ 1000—1005; and as to the dissolution of Injunctions generally *ib.*, at pp. 838—873; High, *Inj.*, § 1505. As to the evidence necessary on the motion to dissolve, see Joyce, *Inj.*, 1278.

² *Freeman v. McArthur*, 2 Tay. & Bell, R., 10 (1851); [this is according to the English practice. See *Hilton v. Lord Granville*, 4 Beav., 130 and cases cited in Kerr, *Inj.*, 633, note (s).]

³ *Freeman v. McArthur*, at p. 28.

⁴ *Sreemutty Sohochurry Dossee v. Hurree Kisto Roy*, 2 Boulnois, 62 (1859), and see Kerr, *Inj.*, 633, note (t).

⁵ *Dalglish v. Jarvice*, 2 Mac. & G., 241.

⁶ *Clifton v. Robinson*, 16 Beav., 355.

⁷ Kerr, *Inj.*, 633-634: *et ibi causas.*

⁸ *Fitch v. Rochfort*, 18 L. J., Ch., 458.

⁹ *Freeman v. McArthur*, 2 Tay. & Bell, R., 26.

on notice be set aside as having been issued on insufficient grounds, the plaintiff is at liberty to apply again, if he be in a position to make out a *prima facie* case.¹ The Court does not deal with the same severity and strictness in the case of an Injunction obtained on motion, as with an Injunction obtained *ex parte*; but the circumstances of the case may be such as to call upon the Court to visit the plaintiff with the same severity.²

An appeal lies under section 588, cl. (24), of the Code of Civil Procedure, from an order discharging, varying or setting aside an Injunction or an order *refusing* to discharge, vary or set aside an Injunction: the appeal given by that section not being limited to an affirmative, but including also a negative order.³ Acquiescence in an order for an Injunction and delay may disentitle to a right to dissolve.⁴

Upon a motion being made to dissolve an Injunction, the Court will either absolutely dissolve it or continue it to the hearing according to the merits of the case as shown by the pleadings and evidence. But each of the parties restrained must move to dissolve and the Injunction will not be dissolved as to those not moving.⁵

§ 41. An order granting a temporary Injunction under section 492 or 493 of the Civil Procedure Code may be appealed from as also may an order under section 496 relating to the discharge, variance or setting aside of such an Injunction already issued.⁶ In the latter case there is an appeal both from an order discharging, varying or

Appeal in the
matter of
Injunctions.

¹ *Jaggivan v. Shridhar*, I. L. R., 2 Bom., 255, 256 (1877); *Spelling, op. cit.*, § 1047.

² *Kerr, Inj.*, 634; *MacLaren v. Stainton*, 16 Beav., 290.

³ *Zabada Jan v. Muhammad Taiab*, I. L. R., 15 All., 8 (1892).

⁴ *Joyce, Inj.*, 1269-1270; *High, Inj.*, § 1490: so also want of diligence on the part of the complainant in prosecuting his cause may afford ground for dissolution; *ib.*, § 1490.

⁵ *Joyce, Inj.*, 1270, 1274, 1278.

⁶ *Civ. Pr. Code*, s. 588, cl. (24).

setting aside an Injunction for an order refusing to discharge, vary or set aside an Injunction : the appeal given by the Code not being limited to an affirmative but including also a negative order.¹ No appeal lies from the order of a Judge refusing to grant an Injunction without notice to the defendant.² As to the issue of Injunctions by Courts of Appeal, see *ante*, pp. 72-74. An appeal also lies from an order under section 497 of the Code relating to the grant of compensation to the defendant for the issue of an Injunction upon insufficient grounds.³ Where a permanent Injunction has been granted by the judgment, the right of appeal is governed by the Charters of the High Courts⁴ the provisions of the various Civil Courts Acts,⁵ and the ordinary rules contained in the Civil Procedure Code relating to appeals from original decrees,⁶ from appellate decrees⁷ and to the Privy Council.⁸ By section 43 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure. On a petition being presented to a District Court asking that the guardians of certain minors, who had been appointed by the Court under the Guardians and Wards Act, might be removed, the

¹ *Zabada Jan v. Muhammad Taiab*, I. L. R., 15 All., 8 (1892).

² *Luis v. Luis*, I. L. R., 12 Mad., 186 (1888).

³ Civ. Pr. Code, s. 588, cl. (24); see as to such orders, *ante*, § 28.

⁴ Letters Patent, 1865, cls. 15 and 16 (Calcutta). The provisions of the Letters Patent for the Madras and Bombay High Courts are *mutatis mutandis* the same as those for the

Calcutta High Court. Letters Patent, N.-W. P., 1866, cl. (11).

⁵ Act XII of 1887 (Bengal), ss. 20, 21; Act III of 1873 (Madras), s. 13, Act XIV of 1869 (Bombay), ss. 8, 16, 17, 26.

⁶ Civ. Pro. Code, Ch. XLI.

⁷ *ib.*, Ch. XLII.

⁸ *ib.*, Ch. XLV; as to Pauper Appeals, v. *ib.*, ss. 592, 593.

Judge passed an order in which he purported to issue an Injunction under section 492 of the Code of Civil Procedure for the attachment of the estate of the minors and to appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that in as much as no appeal was provided by that Act in respect of such an order, no appeal lay :

Held, that though both orders were passed without jurisdiction, the Judge purporting to have acted under section 492 of the Code of Civil Procedure as regards the issue of an Injunction, and under section 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal.¹

§ 42. A Court may before or on the hearing of a suit or appeal in which the decree is final either of its own motion or on the application of any of the parties refer any question of law to the High Court for its decision.² And the High Court may, for the purposes of revision call for the record of cases which are not appealable to it.³ Further any person considering himself aggrieved

Reference, Revision and Review in the same matter.

¹ *Abdul Rahiman Sahab v. Ganapathi Bhatta*, I. L. R., 23 Mad., 517 (1900).

² Civ. Pr. Code, § 617.

³ *Id.*, § 622. For examples of the exercise of such power of revision in

the matter of Injunctions, see *Luis v. Luis*, I. L. R., 12 Mad., 186 (1888); *Gossain Money Puree v. Gour Pershad Singh*, I. L. R., 11 Cal., 146 (1884), cited *ante*, pp. 74, 75.

by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed; or by a judgment on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, or the Court, if any, to which the business of the former Court has been transferred. This power of review of judgment is exerciseable either by Courts of first instance or Courts of Appeal upon the grounds and terms mentioned in the Civil Procedure Code,¹ and is distinct from an appeal, the former being a reconsideration of the same subject by the same Judge, the latter being a hearing before another tribunal.

¹ Costs.
Court Fee.

§ 43. When disposing of any application for an Injunction, the Court may give to either party the costs of the application or may reserve the question of costs. Costs of an application ordered to stand over till trial, and costs reserved to be disposed of at the trial follow the event of the trial without any special direction. If the costs are not reserved upon an interlocutory application and in all cases when judgment is finally delivered in the action, the judgment will direct by whom the costs are to be paid. The Court has full power to give and apportion costs of every application and suit in any manner it thinks fit. But the general rule is that costs of an application or suit follow the event, and if the Court directs otherwise it must state its reasons in writing.² So where a party is entitled to appeal and has obtained a decree he will be awarded the costs of the appeal even though it be a hard

¹ Civ. Pr. Code, Ch. XLVII. For an example of review of judgment refusing an Injunction, see *Dhuronidhur Sen v. Agra Bank*, I. L. R., 5 Cal., 86 (1879).

² Civ. Pr. Code, Ch. XLVIII; see *Kerr, Inj.*, 31, 32, where the rules laid down by Sir John Leach in 1 Sim. & St., 357 are given, as also the several exceptions to these rules.

case.¹ If both parties are in the wrong, no costs will be given to either side.² A suit for an Injunction and including no claim for damages is not a suit to recover a debt or damages within section 376 of the Civil Procedure Code dealing with payment into Court. In such a case a Judge has full power under section 220 of the Code to apportion the costs : but the principle underlying section 379 of the Code ought to regulate the discretion of the Court in directing the payment of costs.³

A suit of the nature referred to in section 283 of the Code of Civil Procedure, instituted for the declaration of the plaintiff's right to and possession of a property attached, and for a perpetual Injunction to restrain its sale in execution of a decree, is one, in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.⁴

§ 44. An order granting a temporary Injunction may be enforced by imprisonment of the defendant for a term not exceeding six months, or the attachment of his property or both.⁵ The High Courts in India have further all the powers of a Court of Equity in England for enforcing their orders and decrees *in personam*.⁶ The remedy for the enforcement of decrees granting permanent Injunctions lies in execution of the decrees and the procedure laid down by the Code relating to the execution of decrees is to be observed.⁷ The practice to be followed in the case of breach of an Injunction has been dealt with in § 27, *ante*.⁸

Enforcement
of orders and
decrees grant-
ing Injunc-
tions.

¹ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 19 Bom., 764, 770 (1895).

² *Hilliard v. Hanson*, 21 Ch. D., 69; *Aylwin v. Evans*, 47 L. T. N. S., 568.

³ *Luxumon Nana Patil v. Moroba Ramerishna*, I. L. R., 21 Bom., 502 (1896).

⁴ *Fulkumari v. Ghanshyam Misa*, I. L. R., 31 Cal., 511 (1903).

⁵ Civ. Pr. Code, § 493 *v. ante*, p. 76.

⁶ *v. ante*, p. 75, *et ibi causas*.

⁷ *v. ante*, p. 77 *et ibi causas*.

⁸ *v. ante*, pp. 85-92; High, Inj., §§ 1416-1449; *Hilliard, Inj.*, 172-186.

Limitation.

§ 45. Suits for Injunctions, except suits to restrain waste which must be instituted within three years of the date when the waste begins,¹ have not been specially provided for by the Limitation Act. A suit for a perpetual Injunction under section 54 of the Specific Relief Act falls under Article 120 of that Act,² which provides that a suit for which no period of limitation is provided elsewhere in the schedule must be instituted within six years of the date when the right to sue accrues.³ The doctrine of laches is however applicable to suits for Injunctions, and the Court will, in the exercise of the discretion which it has, decline, in the absence of special circumstances, to make a decree even if a much lesser time than six years has elapsed.⁴ Where a decree awards a perpetual Injunction, application for execution of the decree must be made within three years from the time when there is a breach of the Injunction.⁵ A suit for compensation for injury caused by an Injunction wrongfully obtained must be instituted within three years of the time when the Injunction ceases.⁶ An application to revive a previous application for execution which had been temporarily suspended by an Injunction, or by reason of an order under section 280 of the Code or other obstacle is according to the Calcutta, Bombay and Allahabad High

¹ Act XV of 1877 (Limitation), Art. 41.

² *Kanakasubai v. Muttu*, I. L. R., 13 Mad., 445 (1890).

³ See *Ranga Pai v. Baba*, I. L. R., 20 Mad., 398 (1896), where it was held that the suit for an Injunction was not barred.

⁴ *Mitra's Law of Limitation*, 3rd ed., pp. 764, 60, 68, 69 and *v. ante*.

⁵ *Satagopa v. Krishnamachari*, I. L. R., 12 Mad., 364 (1889); Act

XV of 1877, Art. 178.

⁶ Act XV of 1877, Art. 42 *v. ante*, p. 94. When the attachment of moveable property released under s. 280 of the Civ. Pr. Code is maintained by an Injunction issued in a suit under s. 283, and such suit is ultimately dismissed, a suit to recover damages for injury to the property, while under attachment, is governed by this article. *Mitra's Limitation* p. 683, citing Punjab Records, Rivaz, 137.

Courts governed by Article 178 of the Limitation Act. The three years are to be computed from the date on which the Injunction or other obstacle is removed.¹ In computing the period of limitation prescribed for any suit, the institution of which has been stayed by Injunction or order, the time of the continuance of the Injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.²

¹ *Mitra's Limitation*, p. 880, *et ibi* are governed by Art. 179. *Narayana*
cases. According to the Madras High *v. Pappi*, I. L. R., 10 Mad., 22 (1886).
Court all applications for execution ² Act XV of 1877, s. 15.

CHAPTER IV.

INJUNCTIONS IN RESPECT OF JUDICIAL PROCEEDINGS.

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| <p>§ 46. CONTROL AND STAY OF PROCEEDINGS</p> <p>§ 47. INJUNCTIONS IN RESTRAINT OF PROCEEDINGS</p> <p style="padding-left: 20px;">(i) in England ;</p> <p style="padding-left: 20px;">(ii) in India prior to the Specific Relief Act.</p> <p>§ 48. PRESENT LAW—</p> <p style="padding-left: 20px;">(i) Contemplated Proceedings may be stayed,</p> | <p style="padding-left: 20px;">(ii) but not pending proceeding unless there is danger of—</p> <p style="padding-left: 20px;">(iii) multiplicity of proceedings—</p> <p style="padding-left: 20px;">(iv) and the proceedings stayed are those of a subordinate Court.</p> <p>§ 49. WRONGFUL SALE IN EXECUTION OF DECREE.</p> |
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Control and stay of proceedings.

§ 46. Where there is a single judicial proceeding the Court has power to transfer the proceeding from one Court to another;¹ to stay proceedings,² or execution of a decree passed therein.³

Where there is more than one judicial proceeding one such proceeding may be affected by another in several ways. Thus no Court can try any suit or issue in which the matter in dispute has been in issue in a former suit and has been therein heard and decided;⁴ nor any suit in which the matter in dispute is also in issue in a previously instituted pending suit.⁵ Superior Courts may enforce the performance of public duties by inferior Courts;⁶

¹ Civ. Pr. Code, ss. 22—25 as to transfer in criminal cases, see Cr. Pr. Code, ss. 191, 192, 526—528.

² Civ. Pr. Code, s. 20, see also Cr. Pr. Code, s. 346.

³ Civ. Pr. Code, ss. 239—243, 545; cf. also Cr. Pr. Code, s. 394,

⁴ Civ. Pr. Code, ss. 13, 14, also Cr. Pr. Code, s. 403.

⁵ Civ. Pr. Code, s. 12

⁶ Specific Relief Act (I of 1877), ss. 45—51. See Shortt on Extra Legal Remedies (1888), pp. 340, *et seq.*; Spelling's Extraordinary Relief, § 136.

and a superior Court may further restrain by Injunction a judicial proceeding of a civil nature pending in a subordinate Court where such restraint is necessary to prevent multiplicity of proceedings.'

§ 47. Of the various forms of procedure touching the control, stay or continuance of proceedings, it is only with the last that the present chapter is concerned. Injunctions in restraint of proceedings.

Prior to the Judicature Act of 1873, there were two (1) in England classes of Courts, namely, Courts of Common law and Courts of Equity, as there were two sets of rights, namely, legal rights and equitable rights. It might and frequently so happened that a plaintiff possessed an undoubted legal right in a Court of Common law and that the defendant had no defence in such Court though entitled to relief in a Court of Equity. In such a case an Injunction granted by the Court of Chancery to restrain judicial proceedings in a Court of law whether before or after judgment; provided a remedy by means of which the plaintiff was prevented from taking an undue advantage of the defendant and enabled the latter to obtain the decision of a Court of Equity upon the question of his claim to equitable relief, against the legal demand of the plaintiff.¹ The principle upon which this jurisdiction was exercised was that wherever a party by fraud, accident or otherwise has an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, and it is therefore

¹ Act of 1877, s. 56, cls. (a), (b), (c).

² For instances in which this equitable jurisdiction was commonly exercised, see Snell's Principles of Equity 11th ed., pp. 579—583; see also Eden Inj., Ch. II; Drewry, Inj., Part I; High, Inj., 45—277; Hilliard, Inj., 187—311. *Dhuronidhur Sen v. Agra Bank*, L. L. R., 4 Cal., 380, 396 (1879). [Injunctions were granted "upon the

assumption that the rights of the parties could not be fully enquired into, except in the Court of Chancery itself. But it is significant that as soon as all the courts of Westminster Hall came to the Courts of Co-ordinate jurisdiction under the new Judicature Acts this proceeding by way of Injunction was abolished," per Markby, J.]

against conscience that he should use the advantage; in such cases to prevent a manifest wrong, Courts of Equity interpose, by restraining the party whose conscience is thus bound from using the advantage he has improperly gained.¹ The Injunctions thus issued by the Court of Chancery for controlling proceedings in other suits were not orders issued to such other Courts but to the party, such party being amenable to the jurisdiction of the Court granting the Injunction and capable of being acted on by the process of contempt of Court and were in fact orders *in personam*.² The Injunction neither assumed any superiority over the Court in which the party is proceeding, nor denied its jurisdiction, but was granted on the sole ground, that from certain equitable circumstances, of which the Court issuing the Injunction has cognisance, it was against conscience for the party to proceed in the cause.³ Injunctions to stay proceedings at law were sometimes granted to stay trial; or after verdict to stay judgment or after judgment to stay execution. The common mode in which relief was granted was after judgment, by enjoining the plaintiff not to sue out execution upon the judgment.⁴

In consequence of the above-mentioned duality in the legal system the cases in which equity interfered by Injunction were usually classed under two heads as being either (1) cases of Injunction to prevent the inequitable institution or continuance of judicial

¹ Joyce's Doctrines, 9; *Dhuronidhur Sen v. Agra Bank*, I. L. R., 5 Cal., 86, 96 (1879), 4 C. L. R., 434. *Kunhamed v. Kuttii*, I. L. R., 14 Mad., 167, 168 (1891); *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 359 (1875); *Hilliard, Inj.*, 187—311.

² *Venkatesa Tauker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338, 341 (1895); Joyce's Doctrines, 9. In re *Artistic Colour Printing Co.*, 14 Ch. D., 502.

Joyce's Doctrines, 9; *Snell's Equity*, 579.

⁴ *Hilliard, Inj.*, 189.

proceedings; or (2) cases of Injunction to restrain wrongful acts unconnected with judicial proceedings.

By the Judicature Act,¹ 1873, the doctrines of the Chancellors were finally and completely adopted into the law of England and the remedy by Injunction, which was theretofore almost entirely peculiar to the Court of Chancery, was rendered equally exerciseable by Courts of law, as it had been by those of equity. By that Act there has been a fusion of law and equity into one system which is administered by all Courts without distinction, though for the sake of convenience certain classes of cases are allotted to each of the divisions of the High Courts. The former jurisdiction of the Court of Chancery to restrain by Injunction an action at law in all cases where the defendant to the action could show that he had a good equitable defence has been abolished by the Judicature Act, which however provides that every matter of equity, in which an Injunction against the prosecution of a proceeding might have been obtained, if that Act had not been passed, may be relied on by way of defence to the action.² In consequence of these provisions, Injunctions properly so called, now fall for the most part under one head only, that is to say, the second of the two heads above mentioned. At the present day instead of the Injunction, a stay of proceedings or other like remedial order would be made in the action.³ There are, however, still certain continuing powers of the Court to grant Injunctions in respect of legal proceedings. Thus an action not pending but only contemplated, or a

¹ ss. 16, 21, 23, 24, 25 by ss. 24, 25, it is enacted that law and equity shall be administered concurrently, and that wherever there is a conflict,

the rules of equity shall prevail.

² Kerr, *Inj.*, 7, 8, 575.

³ Snell's *Equity*, 578, 579.

pending action in a foreign Court, may still, the case being otherwise proper, be restrained by Injunctions.¹

(ii) in India
prior to the
Specific Relief
Act.

The Supreme Courts followed the law and practice of the Court of Chancery. They possessed as well an equity as a common law side, though (in this differing from the English Courts) the same Judges administered both common law remedies and equitable reliefs.² In the mofussil the distinction between law and equity never prevailed. The establishment of the Presidency High Courts in 1862 assimilated the judicial system in this country in nearly every material respect to that which has prevailed in England since the Judicature Act. In India the Courts are both Courts of Equity and Courts of Common Law in one.³ It follows from the dissimilarity of the circumstances of this country from those which existed in England prior to the Judicature Act that the English case-law anterior to that period is not here of much assistance.

The reported cases show that prior to the Specific Relief Act the High Courts restrained by Injunction proceedings both instituted and pending in the mofussil against the Court Receiver to recover possession of

¹ Kerr, Inj., 7, 8, 575, *et seq.*; *Armstrong v. Armstrong*, 1892, p. 98; the Courts in India would appear to have no jurisdiction to stay pending proceedings in a foreign Court, see Act I of 1877, s. 56, cl. (b); Madras L. J., Parts v and vi, p. 164, vol. v., May & June, 896. As to powers of Courts of Bankruptcy, see *ex parte Dixon*; *In re Woods*, 1 Ch. D., 557; *Ex parte Reynolds*; *In re Barnett*, 15 Q. B. D., 169.

² Clarke's Rules and Orders, 1829; Preface, p. x; Cowell's Tagore Law Lectures, 1872, p. 53; see the Charters, 13 Car. II, 35 Car. II, 9th Aug.

1683; 13 Geo. I; *Borrodaile v. Chainsook Buxiram*, 1 Hyde, 60, 61; 13 Geo. III, c. 63, s. 18, 26th March, 1774; Charter establishing Supreme Court at Fort William, Bengal 39 and 40 Geo. III, c. 79, s. 2, 26th Dec. 1801 (*ib.* Madras); 4 Geo. IV, c. 71, s. 7, 1823 (*ib.* Bombay). See § 2, *ante*.

³ See Objects and Reasons to Specific Relief Bill. "It is hardly necessary to observe that in a country where law and equity are administered by the same courts the subject of staying legal proceedings need not be dealt with at much length."¹

part of certain lands which were in the hands of the receiver;¹ as also proceedings not instituted but threatened,² and prohibited the execution of a decree which had already been obtained,³ and any decree that might be obtained in a contemplated suit, until a certain date fixed by the order of the Court.⁴ In the last cited case the proceedings were threatened to be taken in a Court subordinate to that from which the Injunction issued.⁵ In a subsequent case⁶ the proceeding sought to be restrained was both instituted and pending and the decree in respect of which the Injunction was sought was that of a Court exercising co-ordinate jurisdiction with the Court in which the Injunction was applied for. In the first instance the Injunction was refused,⁷ but subsequently upon review of judgment the Injunction was issued upon grounds which it is not easy to understand in so far as the distinction made by the Court of Review⁸ between an Injunction issued to or affecting the Court itself and an Injunction issued against the party himself is one common to all Injunctions in restraint of judicial proceedings. The *ratio decidendi*, however,

¹ *Beer Chunder Jhoograj Gohasree v. Hogg*, Cor. 56 (1864). The Injunction in this case went not only against the defendant but also enjoined the Principal Sudder Ameen in whose Court the suit was instituted from proceeding in the matter, until the further orders of the High Court. In *Dhuruuidhur Sen v. Agra Bank*, I. L. R., 4 Cal., 380 (1878); S. C. in review, I. L. R., 5 Cal., 86 (1879); the execution sought to be restrained was also pending.

² *Moran v. River Steam Navigation Company*, 14 B. L. R., 352, 361 (1875) [judgment of the court of first instance].

³ *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571 (1871). The execution restrained in this case does not appear to have been pending.

⁴ *Moran v. River Steam Navigation Company*, supra, at p. 366 [judgment in appeal].

⁵ See *Dhuruuidhur Sen v. Agra Bank*, I. L. R., 4 Cal., p. 397 (1878).

⁶ *Dhuruuidhur Sen v. Agra Bank*, I. L. R., 4 Cal., 380 (1878), S. C. in review, I. L. R., 5 Cal., 86 (1879).

⁷ *id.*, I. L. R., 4 Cal., 380.

⁸ *id.*, I. L. R., 5 Cal., 96; see *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 341 (1895).

appears to have been that the order complained of was a mere nullity inasmuch as the plaintiff Bank was no party to the original suit in which the decree sought to be executed was made and was not the legal representative of such party. The order was in effect an order that a decree should be executed against a person, who was not in fact a party to the suit. The property, therefore, sought to be attached in execution was the property of the plaintiff Bank and the defendant was wrongfully attempting to sell that property before any adjudication had been made of his right so to do and he was so acting in a suit brought against a third person to which suit the Bank was in point of law no party.¹ It is to be noted moreover with regard to wrongful sales in execution of a decree that section 92 of the Civil Procedure Code (Act VIII of 1859) corresponding with section 492 of the present Code contained no provision with reference thereto.²

It was also held that the purchaser of a share of a decree who has failed in the endeavour to get the Court executing it to put him upon the record for the purpose of obtaining the benefit of the decree, has no right to an Injunction to prevent the decree-holder from executing the whole decree without regard to the sale even if the purchase is made on behalf of the judgment-debtor; he could only get a right to an Injunction of the kind, if the sale amounted to a release from the decree-holder to the judgment-debtor from his liability under the decree.³

¹ As to the order being a nullity all Courts were agreed, see 1. L. R., 4 Cal., 383, *per* White, J.; *ib.* 395, *per* Markby, J., *ib.*, 391, *per* Ainslie, J., 1. L. R., 5 Cal., 96, 97, *per* Garth, C. J. For a somewhat analogous

case, see *Krishnaji v. Vithalrao*, 1. L. R., 12 Bom., 80 (1887).

² *v. post.*

³ *Mussamat Rohimunnissa v. Nawab Leakut Ali Khan*, 22 W. R., 506 (1874).

§ 48. The Specific Relief Act passed in 1877¹ and ^{Present law.} sections 492 and 493 of the present Code of Civil Procedure contain the law now in force upon this subject. Section 56 of that Act applies no doubt in terms only to perpetual Injunctions, temporary Injunctions being left by section 53 to be regulated by the Code of Civil Procedure.² Section 56 therefore does not affect temporary Injunctions against wrongful sale in execution of a decree applied for under section 492 of the Civil Procedure Code.³ In a general manner however the same principles must equally apply to the granting of a temporary as to a perpetual Injunction and these principles must therefore be sought in the Specific Relief Act itself.⁴ By the English Judicature Act an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just. It has however been observed that the framers of the Civil Procedure Code have apparently expressly refrained from putting temporary or interlocutory injunctions on the same footing as they are put by the Judicature Act; and it has been held that they intended to limit such applications to the matters enumerated in sections 492 and 493 of the Civil Procedure Code only. Therefore in a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Cause Court in respect of

¹ Act I of 1877, s. 56, cls. (a), (b) 351 (1895).
and (c).

² *id.*

³ *Amir Dulhin v. Administrator-General of Bengal*, I. L. R., 23 Cal.,

⁴ *v. ante*, p. 7.

the same contract until the hearing of the High Court suit. *Held*, that an application to restrain a suit in the Small Cause Court did not come within the provisions of sections 492 and 493 of the Civil Procedure Code. The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, section 25 sub-clause 8. As the injunction asked for was a perpetual one, it could, under the Specific Relief Act, only be granted by the decree made at the hearing. The Court was of opinion that the proper course for the plaintiffs was to apply to the High Court to remove the defendant's suit from the Small Cause Court to the High Court under clause 13 of the Letters Patent.¹ The question does not appear to have been considered whether apart from the terms of the Civil Procedure Code the High Court might issue the injunction under the general Equity jurisdiction inherited by it from the Supreme Court which jurisdiction it might be argued was *ex-hypothesi* unaffected by any special Legislative Enactment. In a recent decision in which the Bombay case was cited it was held that the High Court had jurisdiction to restrain the Presidency Small Cause Court from proceeding with a suit.²

As the subject-matter of complaint may be either a breach of contract, or civil wrong, or an act which is criminal, so judicial proceedings may be either civil or criminal. An Injunction cannot be granted to stay proceedings in any criminal matter.³ But if an act which is criminal touches also the enjoyment of

¹ *Jairamdas v. Zamonai*, I. L. R., 27 Bom. 357 (1903).

² *Hart v. Groover*, 9 C. W. N., 748 (1905.)

³ Act I of 1877, s. 56, cl. (c); see

Kerr, Inj. 5; Joyce's Doctrines, 291, 292; Snell's Equity, 11th ed., 582; and *ante*, pp. 40, 41. See Madras L. J., p. 165, Parts v and vi, Vol. v., May and June, 1895.

property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property.¹ With regard to civil "judicial proceedings" a term which includes both an action and proceedings taken in execution² of a decree obtained therein, the rule is that a judicial proceeding not pending but contemplated and threatened only may be restrained as also a pending proceeding; provided that such proceeding is pending in a Court subordinate to that from which the Injunction is sought, and such restraint is necessary to prevent multiplicity of proceedings.³ In other cases no Injunction will issue.

Injunctions of this class which will be granted may thus be divided into (1) Injunctions in restraint of suits or applications for execution which are not instituted and pending, but are contemplated and threatened only.⁴ And Injunctions in restraint of such applications for execution may be (a) Injunctions restraining the execution of any decree which might be obtained in a contemplated action;⁵ (b) restraining the execution of a decree which has already been obtained, but in respect of which at the date of the issue of the Injunction no application for execution has yet been made⁶; (2) Injunctions in restraint of pending suits and pending applications for execution, that is, Injunctions in restraint of the execution of decrees already made and upon

¹ *v. ante*, pp. 40, 41.

² *Appu v. Raman*, I. L. R., 14 Mad., 425 (1891); *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338 (1895).

³ Act I of 1877, s. 56, cls. (a) & (b).

⁴ *Moran v. River Steam Navigation Company*, 14 B. L. R., 352 (1875); *Appu v. Raman*, I. L. R., 14 Mad., 425, 429, 430 (1891). [See

Venkatesa Tawker v. Ramasami Chettiar, I. L. R., 18 Mad., 341 (1895).

⁵ *Moran v. River Steam Navigation Company*, 14 B. L. R., 352 (1875).

⁶ *Appu v. Raman*, I. L. R., 14 Mad., 425, 430 (1891). The decisions *Kunhamed v. Kutti*, I. L. R., 14 Mad., 167 (1891); *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571 (1871), appear also to be cases of this kind.

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which decrees at the date of the application for an Injunction, steps have been already taken in execution ;¹

(3) Injunctions which are issued not in general restraint of execution whether pending or not, but in prevention of wrongful sale in execution of a decree, may be conveniently considered separately from the two classes above mentioned.²

In the case of a fraudulent decree the remedy would appear to be by way of Injunction to restrain the party from executing the decree.³

(i) Contem-
plated pro-
ceedings may
be stayed.

The Specific Relief Act only forbids the issue of Injunctions in restraint of *pending* proceedings.⁴ So in England it has been held that although the Court has no longer jurisdiction to restrain a pending action yet an Injunction may be granted to restrain the *institution* of proceedings.⁵ Thus an Injunction has been granted to prevent a wife from instituting proceedings against her husband in the Divorce Court for restitution of conjugal rights;⁶ and a person claiming to be a creditor of a company was restrained by Injunction from presenting a petition for winding up the company when the debt was disputed and the company was solvent.⁷ If the proceeding be not pending at the date of the institution of the suit in which the Injunction is sought, but is contemplated, and threatened only, there is nothing, the case being otherwise proper, to prohibit an Injunction being granted against the actual institution of such threatened proceedings.⁸ And this is so,

¹ v. post, p. 189.

² v. post, § 49.

³ *Kunhamed v. Kutti*, I. L. R., 14 Mad., 187, (1891).

⁴ S. 56, cl. (a).

⁵ *Besant v. Wood*, 12 Ch. D., 630 ;
Hart v. Hart, 18 Ch. D., 671 ; *Kerr*,
Inj., 8.

⁶ *Besant v. Wood*, supra.

⁷ *Circle Restaurant &c., Co. v. Lavery*, 18 Ch. D., 555.

⁸ See *Moran v. River Steam Navigation Company*, 14 B. L. R., 352 (1875) ; *Appu v. Raman*, I. L. R., 14 Mad., 425, 430 (1891).

whether such proceedings be an intended suit¹ or intended application for execution of any decree which may be obtained in a contemplated action,² or which has already been made.³ In the first of the cases last cited a Subordinate Judge prohibited certain parties from executing a decree which had been passed in their favour, and which was on the file of the District Judge, it appearing that no application for execution had yet been made. It was held that the prohibition was not an Injunction to stay proceedings in the Court of the District Judge, but that the effect of the Injunction granted by the Subordinate Judge was to prevent those parties from applying to the District Court to execute its decree. As no application for execution had yet been made, and as, so long as the Injunction was in force, none could be made, therefore no pending proceeding of a Court was restrained by the Injunction.⁴

An Injunction cannot be granted to stay a judicial proceeding *pending* at the institution of the suit in which the Injunction is sought unless such restraint is necessary to prevent a multiplicity of proceedings,⁵ and the

(ii) but not pending proceedings unless there is danger of—

¹ See *Moran v. River Steam Navigation Company* (judgment of Original Court).

² See *id.* (judgment of Court of Appeal).

³ *Appu v. Raman*, I. L. R., 14 Mad., 425, 430 (1891); and see also *Ananthnath Dey v. Mackintosh*, 6 B. L. R., 571 (1871); *Kunhammed v. Kutti*, I. L. R., 14 Mad., 167 (1891).

⁴ *Appu v. Raman*, I. L. R., 14 Mad., 425, 430 (1891); see *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 341 (1895). It has been suggested that the decision first cited is erroneous inasmuch as s. 56, cl. (b), refers to proceedings *whether pending or not* and prevents an injunction, whereas in the case cited the Court

was not subordinate, and that clause permits an injunction to stay the institution of proceedings in a Subordinate Court only (*Madras Law Journal*, Vol. v., May and June, 1895, pp. 162, 165.) But it is admitted that, Injunctions acting merely in *personam*, it is difficult to understand this departure from English law, according to which the institution of proceedings in any Court can be stayed. It is submitted that the decision is correct and that the proceeding referred to in cl. (b) is a pending proceeding.

⁵ Act I of 1877, s. 56, cl. (a). See *Deno Bundhu Nundy v. Hari Mati Dassee*, I. L. R., 31 Cal., 480 (1904).

proceedings sought to be restrained is that of a Court subordinate to that from which the Injunction is sought.¹ These provisions of the Specific Relief Act have in view two important prerogatives of the Court of Chancery *viz.*—*Firstly*, that of staying pending proceedings at law by what was known as a common Injunction in all cases where the defendant would show a good equitable defence; a prerogative which has now been abolished by the Judicature Act though the equitable plea upon which such an Injunction would formerly have been based may be relied on by way of defence in the action.² *Secondly*, that of suppressing useless litigation and of preventing a multiplicity of suits, the design being to procure repose from perpetual litigation.³ “Clause (a)⁴ of section 56 of the Specific Relief Act is apparently taken from section 24 (5) of the English Judicature Acts of 1873 which was as follows :— ‘No cause or proceeding at any time pending in the High Court of Judicature or before the Court of Appeal shall be restrained by prohibition or Injunction.’ The object of the enactment appears to have been to do away with the use of Injunctions as a means for controlling proceedings in other Courts and it has been adopted in Act I of 1877 to prevent in the Courts of this country the use of any such jurisdiction.”⁵ Where judicial proceedings are pending as where a decree has been made and at the date of the application for an Injunction proceedings have been commenced and are pending to execute that decree then, unless the proceedings are pending in a subordinate Court and restraint is necessary to prevent a multiplicity of

¹ Act I of 1877, s. 56, cl. (b). See *Deno Bundhu Nundy v. Hari Mati Dassee*, I. L. R., 31 Cal., 480 (1904).

² *v. ante*, § 47.

³ Story, Eq., § 862, *et seq.*, 2nd English ed. Nelson's Specific Relief

Act, 290, 291.

⁴ The report has “cl. (b)” but this is an error.

⁵ *Appu v. Raman*, I. L. R., 14 Mad., 425, 429 (1891).

proceedings, no Injunction can issue to restrain such execution.¹

Particularly, since the passing of the Specific Relief Act an Injunction may properly be granted if, on a consideration of the facts of the case, the Court thinks that that remedy is necessary in order to prevent repetition of injury and multiplicity of suits.² The Specific Relief Act in this provision has in view the jurisdiction of Courts of Equity by Bills of Peace bearing some resemblance to Bills *quia timet* to suppress useless litigation and to prevent multiplicity of suits, the design being to procure repose from perpetual litigation.³ It enacts that when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property the Court may grant a perpetual Injunction where it is necessary to prevent such multiplicity.⁴ Where in England a Bill of Peace would have lain, or as now, an action in the nature of such a Bill, that is (1) where there is one general right to be established against several or a number of distinct persons,⁵ or (2) where the plaintiff after repeated and satisfactory trials has established his right and yet is in danger of further litigation and obstruction to his rights

¹ *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338 (1895); and see *Mahip Singh v. Chotu*, I. L. R., 5 All., 429 (1883).

² Act I of 1877, s. 58, cl. (a); *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 220 (1887) per Wilson, J., "It is most desirable to guard as far as possible against a multiplication of suits." Per Straight, J., in *Kirpa Dayal v. Rani Kishori*, I. L. R., 10 All., 80, 82 (1887). So also in *Moran v. River Steam Navigation Company*, 14 B. L. R., 359 (1875), one of the grounds upon which the Injunction

was granted was the prevention of simultaneous litigation in the High Court and the Mofussil between the same parties.

³ See Snell's Eq., 629, 630; Kerr, *Inj.*, 586—588; Story, Eq., § 852, *et seq.*; Nelson's Specific Relief Act, 291.

⁴ In *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338, 341, 342 (1895), it was held that the Injunction there prayed for was not necessary on this ground.

⁵ Story, Eq., §§ 854—856; Kerr, *Inj.*, 586—588; Nelson, *op. cit.*, 291.

from new attempts to controvert it;¹ under either of these circumstances an Injunction staying a pending judicial proceeding may be granted. By the Act, however, an Injunction against pending proceedings is only granted to prevent multiplicity,² and only in cases where the Court in which the proceedings are to be stayed is subordinate to that in which the Injunction is sought.³

(iv) and the proceedings stayed are those of a Subordinate Court.

Even if a proceeding be pending which it is necessary to restrain to prevent multiplicity of proceedings no Injunction can issue unless the proceedings sought to be stayed are those of a Court subordinate to that from which the Injunction is sought.⁴ Under no circumstances can one Court restrain by Injunction proceedings pending in another Court which is not subordinate to it. The proceeding which is mentioned in clause (b) is a pending proceeding.⁵ If the effect of the Injunction is merely to prevent the *institution* of proceedings in a Court whether subordinate or not subordinate, or to restrain *pending* proceedings in a Subordinate Court, it may go.⁶ But if the proceeding is pending in a non-Subordinate Court⁷ or in the same Court⁸ the Injunction cannot issue. This provision does not apply to temporary Injunctions against wrongful sale in execution of a decree.⁹

¹ Story, Eq., § 859; Nelson, *op. cit.*, 291.

² *Dhurunidhur Sen v. Agra Bank*, I. L. R., 4 Cal., at p. 391 (1878).

³ *Id.*, at p. 396; Act I of 1877, s. 56, cl. (b).

⁴ Act I of 1877, s. 56, cl. (b). See *Dhurunidhur Sen v. Agra Bank*, I. L. R., 4 Cal., 390 (1878). In *Sethurayar v. Shanmugam Pillai*, I. L. R., 21 Mad., 353 (1897), it was held that the Injunction could not be granted.

⁵ *Appu v. Raman*, I. L. R., 14 Mad., 425 (1891) in which cl. (b) of s. 56, Act I of 1877, was held not

to be applicable as the proceedings sought to be restrained were not pending.

⁶ *Id.*

⁷ *Mahip Singh v. Chotu*, I. L. R., 5 All., 429 (1883); *Sethurayar v. Shanmugam Pillai*, I. L. R., 21 Mad., 353 (1897).

⁸ *Venkatesa Tawker v. Ramasami Chettiar*, I. L. R., 18 Mad., 338 (1895).

⁹ *Amir Dulhin v. Administrator-General of Bengal*, I. L. R., 23 Cal., 351 (1895); *v. post.*

§ 49. If in any suit it is proved that any property in dispute in the suit is in danger of being wrongfully sold in execution of a decree, the Court may issue an Injunction to restrain such sale.¹ Section 92 of the old Code (VIII of 1859) contained no such provision, and it was accordingly held that property which was about to be sold in execution could not be said to be in danger of being "wasted, damaged or alienated by any party to the suit."² Under the old law, the procedure was by application to the Court of execution to stay the sale of the attached property pending the determination of title in the regular suit which was brought to establish it.³ But the Legislature has deliberately altered⁴ the law as laid down in the first and second of the cases last cited. In section 492 of the present Code, other words have been introduced, namely, "or wrongfully sold in execution of a decree," and these words must be read with the previous part of the section, that is, "that any property in dispute in a

Wrongful sale
in execution of
decree.

¹ Civ. Pr. Code, s. 492. The words "or wrongfully sold in execution of a decree" were first added to the section by the Code of 1877 (Act X of 1877) see *Brojendra Kumar Rai Chowdhuri v. Rup Lal Das*, I. L. R., 12 Cal., 515, 517 (1886).

² *Roy Luchmiput Singh v. Secretary of State*, 11 B. L. R., App. 27, (1873) S. C., 20 W. R., 11, followed in *Durga Churn Chatterjee v. Ashootosh Dutt*, 24 W. R., 70 (1875). An Injunction however of this character appears to have been granted in two earlier cases. *Sreenarain Chuckerbutty v. A. B. Miller*, 5 B. L. R., 254 note (1870); *Rup Lal Khetry v. Mahima Chunder Roy*, 5 B. L. R., 254 (1870). In the latter case the defendant who claimed through persons who were alleged to have no title was threatening to sell in execution of a decree against those persons, property

in the possession of the plaintiff under a decree of Court obtained upon a mortgage executed in his favour by a person having title. See also *Anantnath Dey v. Mackintosh*, 6 B. L. R., 571 (1871).

³ *Doorga Churn Chatterjee v. Ashootosh Dutt*, 24 W. R., 70 (1875); *Roy Luchmiput Singh v. Secretary of State*, 11 B. L. R., App. 27 S. C., 20 W. R., 11 (1873); *Brojendra Kumar Rai Chowdhury v. Rup Lal Das*, I. L. R., 12 Cal., 515, 517 (1886).

⁴ See report of Select Committee on the Civil Procedure Bill—"We have empowered the Court to grant an Injunction to stay a wrongful sale in execution of a decree. We have been informed that the corresponding clause of Act VIII of 1859 has been held not to apply to such a case".—*Gazette of India*, 30th Sept. 1876, p. 947.

suit is in danger.' The law does not say that a property is, or is about, to be wrongfully sold, but that it is in danger of being wrongfully sold.¹ These words are wide enough to include,² and the section is, in fact, most commonly applicable to claims in execution made under section 278 of the Civil Procedure Code. If a claimant under that section, whose claim has been disallowed, institutes a regular suit against the decree-holder, the Court has power under section 492 of the Code to grant an Injunction staying the sale pending the decision of the suit.³ And the Code having been amended so as to admit of the grant of an interlocutory Injunction in such a case, the procedure indicated by section 492 should be followed and a sale should, in the case of applications by third parties, be restrained by Injunction in the suit brought to try the title and not by the order of the Court executing the decree.⁴ And in the execution of a decree ordering the sale of property, it is not competent for a Court to refuse to sell it because a stranger, who is in possession of such property, impeaches the decree: the course open to him, if he wishes a stay of execution, being to file a suit and obtain an Injunction for that purpose.⁵ But though where property is in danger of wrongful sale the Court may issue an Injunction restraining the defendant from enforcing his decree against the property, yet when the Court dismisses the suit in which the Injunction is sought and has been granted, it has no right to further restrain

¹ *Brojendra Kumar Rai Chowdhury v. Rup Lal Dass*, I. L. R., 12 Cal., 515, 517, 518 (1886). See *Fulkumari v. Ghanshyam Misra*, I. L. R., 31 Cal., 511 (1903), and as to an injunction being consequential relief as held in the latter case, see *Kunj Behari v. Keshav Lal*, I. L. R., 28 Bom., 567 (1904).

² *Brojendra Kumar Rai Chowdhury v. Rup Lal Dass*, I. L. R., 12 Cal., 515 (1886).

³ *ib.*

⁴ *ib.*; a case which clearly emphasises the difference between the former and present law.

⁵ *Purehottam Vithal v. Purehottam Iswar*, I. L. R., 8 Bom., 532 (1884).

the defendant from execution upon the mere possibility of the Appellate Court reversing its decree. Once the suit is dismissed the Court has, in point of law, no power at all to deal with the proceedings in the suit in which execution has issued.¹ Upon the dismissal of a suit for an Injunction restraining the sale, the Appellate Court may, under section 492 of the Code, issue a temporary Injunction restraining the decree-holder from proceeding with execution pending the appeal;² and the application may be granted subject to the terms of the applicant giving such security as the Court thinks fit.³ This decision has however recently been dissented from the Court holding that in a case like this it was impossible to say that the property was in danger of being "wrongfully" sold: that section 492 required that it must be "proved" that the property was in such danger and that to hold in such an application this was proved would be to decide the appeal which was not before the Court.⁴ It is submitted that the question is rather one of fact than of law, though no doubt dealing with the matter as one of fact the decree appealed from would, unless it was clearly erroneous, prove a serious obstacle to the grant of an Injunction. The Code directs that ordinarily before granting an Injunction notice of the application should be given to the opposite party.⁵ Where a Court made an order granting a temporary Injunction without directing notice of the application for an Injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex parte*.

¹ *Gossain Money Puree v. Gour Pershad Singh*, I. L. R., 11 Cal., 146 (1884); referred to in *Yamin-ud-Dowlah v. Ahmed Ali Khan*, I. L. R., 21 Cal., 561 (1894).

² *Kirpa Dayal v. Rani Kishori*, I.

L. R., 10 All., 80 (1887).

³ *ib.* at p. 83.

⁴ *In re Chando Bibi*, I. L. R., 26 All., 311 (1904).

⁵ Civ. Pr. Code, s. 494.

without the other side being given an opportunity to show cause, it was held that the order was irregular.¹ The application should be made without unnecessary delay² and should on the face of it disclose a sufficient ground to warrant an order under section 492 being made as prayed.³ The meaning of the word 'wrongfully' may, in certain cases, be open to doubt.⁴ It is however clear that the property is not in danger of being wrongfully sold when the plaintiff has no title to or interest in it, or if he has an alleged interest, when such interest is not the subject of sale in execution.⁵ So where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his rights to the property and made an application for a temporary Injunction directing stay of sale pending the decision of the suit, it was held that, inasmuch as what was advertised to be sold was the right and interest of the plaintiff's father in the property it could not be said that the property was being wrongfully sold in execution of a decree and the temporary Injunction ought not to have been granted.⁶ It has been said that in interpreting this portion of the Code a Judge cannot be too careful as to the mode in which he permits the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree-holder in another from obtaining the fruits of his judgment by executing his decree in ordinary course against the property of his judgment-debtor. At the same time it is, of course, most desirable to guard, as far as possible, against a multiplicity of suits, which was

¹ *Amolak Ram v. Sahib Singh*, I. L. R., 7 All., 550 (1885).

² *ib.*, 552.

³ *ib.*

⁴ *Kirpa Dayal v. Rani Kishori*, I. L. R., 10 All., 80, 82 (1887). See *in re*

Chando Bibi, I. L. R., 26 All., 311 (1904), *supra*.

⁵ *Amolak Ram v. Sahib Singh*, I. L. R., 7 All., 550 (1885).

⁶ *Amolak Ram v. Sahib Singh*, I. L. R., 7 All., 550 (1885).

one of the objects the Legislature had in view in passing section 492 in its present shape. The Courts will, therefore, amongst other things consider whether the refusal to grant the application for an Injunction will result in further litigation, and whether any practical injury will result to any one if the Injunction be allowed.¹ It has been held by the Allahabad High Court that the term "decree," as used in the Code of Civil Procedure,² does not include the decree of a Court of Revenue, and that therefore an application under section 492 of the Civil Procedure Code for stay of sale in execution of a decree of a Court of Revenue in a suit under section 93 of Act XII of 1881 cannot be entertained by a Civil Court.³

Section 56 of the Specific Relief Act was not intended to, and does not, affect temporary Injunctions applied for under section 492 of the Code against the wrongful sale of property in execution of a decree. Therefore a Subordinate Court may issue an Injunction restraining proceedings in execution pending before a Superior Court.⁴ Though, as a general rule, the principles governing the grant of temporary and permanent Injunctions are the same,⁵ yet the substantial difference which exists between an Injunction in general restraint of execution and an Injunction against wrongful sale in execution only, affords a reason for dealing with an Injunction of the latter class on a special footing. That difference lies in the nature of the subject-matter of the Injunction and of the proceedings restrained. In the case of an Injunction in general restraint of execution, the applicant may have himself been a party to the suit in which execution

¹ *Per Straight, J.*, in *Kirpa Dayal* R., 16 All., 496 (1894).

v. Bani Kishori, I. L. R., 10 All., 80, 82 (1887).

² S. 2.

³ *Onkar Singh v. Bhup Singh*, I. L.

⁴ *Amir Dulhin v. Administrator-General of Bengal*, I. L. R., 23 Cal., 351 (1895).

⁵ *ante*, p. 7.

has issued, and what is sought to be restrained is execution of the decree in its entirety. A wrongful sale is generally threatened when the property of some third person is taken in execution of a decree in a suit between others to which he was no party. In such a case an application by a third person for an Injunction is in effect an application for restraint of execution only in so far as such execution involves the wrongful sale of property belonging to the applicant. The Injunction therefore is primarily directed against the sale, and not the execution generally which may, even when an Injunction has been granted, proceed, except with respect to the particular property the subject of the Injunction. Further, as was pointed out in the case last cited,¹ the Court of execution deals with the matter only in a summary way, and it is therefore not anomalous or inconvenient, if its order, even if it be the order of a superior Court, should be made subject to the result of a regular suit which may lie in a court of an inferior grade. On the other hand, when an Injunction is sought restraining execution in its entirety by a person against whom and whose property generally execution has been directed to issue in a suit to which he was a party, there is, in fact, a substantial interference in a judicial proceeding, for what is put in issue by the application for an Injunction is not whether a particular property is liable to be sold or not, but whether execution should proceed against a particular person at all. In the one case the Injunction is directed against the sale as an incident of execution, in the other against the execution itself. In the first case the person

¹ See *High, Inj.*, §§ 119. *et seq.*: *General of Bengal*, I. L. R., 23 Cal., 351 (1895).
Hilliard, Inj., p. 249.

² *Amir Duhin v. Administrator*.

seeking the Injunction does not dispute the decree or the issue of execution against the property of the judgment-debtor, but contends that his own property is being wrongfully sold as that of the judgment-debtor. In the second case the applicant contends for the special reasons alleged that execution should not issue against him at all. In the latter instance, if the execution-proceedings be not pending, their institution may in a proper case be restrained, but if they be pending, they can only be stayed, if there be danger of multiplicity of proceedings, and the proceeding in question is that of a Court subordinate to that from which the Injunction is sought.

Where a decree has been obtained against a person based on a personal obligation which ceases at his death and such obligation is not binding on and cannot be enforced against his heir and representative, an Injunction will issue restraining the execution of that decree against such heir and representative. The latter was no party to the suit in which the decree was passed, and as he bears no representative liability, there is no decree enforceable against him.¹

In the case of suits to restrain execution of adjusted decrees, it is now established that section 244 of the Civil Procedure Code is to be liberally construed, and that any suit which interferes with the conduct of execution-proceedings by the Court executing the decree is prohibited, such as a suit for an Injunction restraining execution of an alleged adjusted decree.²

¹ *Krishnaji v. Vitthalrav*, I. L. R., 12 Bom., 80 (1887).

² *Azizan v. Matuk Lall Sahu*, I. L. R., 21 Cal., 437 (1893), followed in *Deno Bundku Nundy v. Hari Mati Dossee*, I. L. R., 31 Cal., 480 (1903), which was a suit for staying execution and declaration of satisfaction and in which Hill, J., was of the opinion

that the prayer for Injunction conflicted with the provisions of s. 56 of the Specific Relief Act. As to injunctions against breach of covenant not to proceed in execution against a particular property, see *Kalyanbhai Dipchand v. Ghanasham Lall Jadunathji*, I. L. R., 5 Bom., 29, 31 (1880).

CHAPTER V.

INJUNCTIONS AGAINST ALIENATION, WASTE, DAMAGE OR FRAUDULENT DISPOSITION OF PROPERTY *Pendente lite*.

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| § 50. INJUNCTIONS AGAINST ALIENATION, WASTE, DAMAGE OR FRAUDULENT DISPOSITION OF PROPERTY <i>Pendente lite</i> . | <i>lite</i> ; |
| (i) Injunctions against waste, damage or alienation <i>pendente</i> | (ii) Fraudulent disposition of property by the defendant <i>pendente lite</i> . |
| | § 51. APPEAL FROM SUCH INJUNCTIONS. |

Injunctions against alienation, waste, damage or fraudulent disposition of property *pendente lite*.

§ 50. Sometimes an Injunction, whether temporary or perpetual, is the instrument by which the Court specifically enforces the obligation if arising in contract, or specifically restrains the violation of those other obligations, which are the subject of the law of tort. In other cases, a temporary Injunction is merely incident or ancillary to the general relief in this sense that it seeks merely to preserve the *status quo*, enjoining interference *pendente lite* by waste, damage or alienation with the subject of litigation or the fraudulent disposition of his property by a party defendant to a suit. Sections 492 and 493 of the Code regulate the grant of temporary Injunctions, the latter relating to temporary Injunctions, in cases of contract or tort, the former relating to Injunctions against interference with the subject of litigation here spoken of as Injunctions *pendente lite*.

In the succeeding consideration of Injunctions in cases of contract and tort, it has not been thought necessary to separate the consideration of temporary and perpetual

Injunctions in cases of contract or tort, but to discuss the cases together without regard to the kind of Injunction sought ; for the kinds of cases, whether of contract or tort, in which an Injunction, either temporary or perpetual, may be granted, do not differ from each other. If the case, as alleged, be such that at the hearing a perpetual Injunction would not be granted, then clearly a temporary Injunction ought not to be granted before the hearing ; though, of course, it does not follow that a temporary Injunction will be granted, before the hearing, in every case in which a perpetual Injunction might fitly be granted at the hearing, for to justify a temporary Injunction, not only must the case be such that an Injunction is the appropriate relief, but there must be the further ingredient that, unless the defendant is at once restrained by Injunction, irreparable injury or inconvenience may result to the plaintiff, before the suit can be decided upon its merits.

In the limited class of cases which are now to be considered, the Injunctions are always from the nature of the case of a temporary character and may thus be separately considered.

Injunctions may thus be roughly divided into (1) Injunctions whether temporary or perpetual in cases of (a) contract or (b) tort which classes of cases are dealt with in the succeeding chapters), and (2) temporary Injunctions against, (a) interference with the subject-matter of litigation, or (b) fraudulent disposition of property pending litigation.

With respect to these latter, the Code provides that if in any *suit* it is *proved* by affidavit or otherwise, (a) that any *property in dispute in a suit* is in danger of being

¹ Collett's Specific Relief, 263, 264.

wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens to remove or dispose of his property with intent to *de/raud* his creditors, the Court may by order grant a temporary Injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such Injunction or other order.¹

(1) Injunctions against waste, damage or alienation *pendente lite*.

The power given by section 492, cl. (a) of the Civil Procedure Code, is substantially the same as that long exercised by English Courts of Equity. The object is to restrain the defendant from doing anything which may prevent the property remaining *in statu quo* during the pendency of a suit, upon the principle that when the plaintiff seeks to recover property in *specie* the defendant shall not be allowed to decide the question in his own favour by dealing or making away with the property, the right to which is the question in dispute. So the Court will restrain not only waste or damage to the subject of litigation whether moveable or immoveable property, but may also restrain the mere alienation of property whether moveable or immoveable. For in every case the plaintiff might be put to the expense of making the vendor a party to the proceeding, and at all events his title, if he prevails in the action, may be embarrassed by such new outstanding title under the transfer.² The Court even though it acts on the doctrine of *lis pendens*, will prevent, if possible, the necessity of proceeding on such a principle, and will not in a proper case deprive

¹ Civ. Pr. Code, s. 492.

ance, 265—273 ; Story, Eq. Jur., §§

² See Collett's Specific Perform-

906—908, 2nd English Edition.

a suitor of the more effective protection of an Injunction.¹

Clause (a) of section 492 of the Code deals with suits in which a claim is made for specific property in the hands of the defendant, and it is only in such suits that any question can arise of waste, damage or alienation. The object of the exercise of the jurisdiction is to secure the safety of that specific property which is in dispute in the suit pending the litigation as also at its close to secure that any decree which may be made with reference thereto shall not prove unfruitful.²

The power, however, of issuing an Injunction *pendente lite* ought to be most cautiously exercised. It is only in cases where property which it is essential should be kept in its existing condition during the pendency of the suit, is in danger of being destroyed, damaged or put beyond the power of the Court. that the latter ought to interfere so as to restrain persons who may turn out in the final event of the litigation to be the actual owners of the property from proper enjoyment and possession of it.³

Immoveable property should always, if possible, be retained *in statu quo*, until the suit which is to determine the title to it shall have been decided.⁴

The restraint imposed need not necessarily be absolute. but should be such as the circumstances require. So where the subject-matter of the Injunction comprised mortgage bonds and Government Promissory Notes, the order of Injunction while prohibiting any alienation of or

¹ *Hood v. Aston*, 1 Russ., 412, one of the large number of cases dealing with Injunctions restraining the negotiation of negotiable instruments and the transfer of stock, securities and other like indicia of property.

² *Goluck Chunder Cocho v. Mohim*

Chunder Ghose, 13 W. R., 95, 96 (1870).

³ *Mun Mohinee Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870), per Phear, J.

⁴ *Gomes v. Carter*, 1 Ind. Jur., N. S., 411 (1866).

dealing with the bonds or notes by the defendant, permitted him to sue upon the mortgage-bond and take steps to realize the amount covered thereby, and ordered the money when realized to be kept in Court, until the disposal of the suit; and as regards the Promissory Notes permitted him to draw the interest as it fell due from time to time.¹

In granting a temporary Injunction restraining the alienation of property, the subject of suit, the Court will, as in the case of other Injunctions, first see that there is a *bonâ fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience² if the Injunction do not issue, bearing in mind the principle (already alluded to) of retaining immoveable property *in statu quo*.³

The wrongful sale of property in execution of a decree is only one form of alienation which may be restrained *pendente lite*.⁴ Even a judicial sale, if wrongful, will be restrained upon principles and under circumstances which have been dealt with in the preceding Chapter of this book.

In order to obtain an Injunction under this section there must be (1) a *suit* in which the Injunction may be granted,⁵ and (2) the threatened danger of waste, damage or alienation must be *alleged* and *proved*,⁶ (3) in respect of property which is in *dispute* in that suit.⁷

Chandidat Jha v. Padmanand Singh Bahadur, I. L. R., 22 Cal., 459, 467 (1895).

² See *Goluck Chunder Goocho v. Mohim Chunder Ghose*, 13 W. R., 95, 96 (1870).

³ *Gomes v. Carter*, 1 Ind. Jur., N. S., 411 (1866), *per* Phear, J.

⁴ Collett, *op. cit.*, 285.

⁵ Civ. Pr. Code, s. 492, *v. post*.

⁶ *Ib.*, *v. post*; *Prosunno Moyee Dossee v. Wooma Moyee Dossee*, 14 W. R., 409 (1870).

⁷ *Ib.*, *v. post*; *Goluck Chunder Goocho v. Mohim Chunder Ghose*, 13 W. R., 95, 96 (1870).

Firstly, the order of Injunction must be made in a regular suit brought to try the title to the property in dispute. It cannot be made summarily. So it was held that the Lower Court could not, in the Summary Department, pass an order declaring invalid a sale of a house made by a manager and granting an Injunction to prevent the demolition of such house, but should have left the title of the parties to be established in a regular suit.¹ And where there is a remedy by a regular suit, the High Court will not exercise its extraordinary powers under section 15 of the Charter. So, where money due to an insolvent was deposited in Court, and the latter ordered it to be paid to creditors who had attached the money instead of to the Official Assignee, the High Court refused to interfere under those powers, holding that the remedy open to the assignee was a suit for an Injunction to restrain the creditors and an order for an Injunction under the Civil Procedure Code.² A Court has no jurisdiction to issue an Injunction to stay waste, damage or alienation with respect to property in dispute in a suit pending in another, even though it be a Subordinate, Court. If the suit be first withdrawn from such last mentioned Court to the first Court, the latter may then issue an Injunction.³ Where a Court has no jurisdiction to make an order of Injunction, it can have no jurisdiction to modify such order.⁴

Secondly, the applicant for the Injunction must allege that the property in dispute in the suit is in danger of being wasted, damaged or alienated. Accordingly where the applicant made no such allegation but merely stated

¹ *Mukrumunnisa v. Abdool Subbar*, 17 W. R., 171 (1872).

² In the matter of *Mr. A. B. Miller*, *Official Assignee*, 12 W. R., 103

(1869), S. C. 4 B. L. R., A. C., 72 n.

³ *Dhundiram Santukram v. Chandanabai*, 2 Bom. H. C. R., 96 (1865).

⁴ *Ib.*

that the defendant wished to realize the debts due to her by bringing actions in Court, and no proof whatever was given of any intention to waste, damage or alienate, an Injunction which had been granted was set aside.¹ Not only must there be an allegation but proof must be given by affidavit or otherwise of that allegation of danger of waste, damage or alienation.⁴ Some reason should be shown why the property to which the plaintiff lays claim should, pending the dispute, be kept from alienation.³

A Court having jurisdiction to make an order of Injunction should not do so without some evidence that the property in dispute in the suit is in danger of being wasted, damaged or alienated by any party to the suit.⁴ The necessary proof may be afforded by the admission of the defendant. So, where it was admitted by the defendant that he intended to take away the money in question in the suit (which money had been attached by, and was in deposit with, the Magistrate) for the purpose of investing it in trade; the Court *held* that this admission was sufficient evidence to show that that money was in danger of being alienated within the meaning of the Code. If the suit had been an ordinary suit for money, the case would have stood on quite a different footing; for then it would not have been a suit for as a specific property, and consequently no question as to whether that property was in danger of being wasted or alienated could have arisen. In the case now cited, however, the subject-matter of contention was a specific sum of money in the custody of the Magistrate; and when the defendant

¹ *Prosunno Moyee Dossee v. Wooma Moyee Dossee*, 14 W. R., 409 (1870).

³ *Civ. Pr. Code*, s. 492, *Prosunno Moyee Dossee v. Wooma Moyee Dossee*, 14 W. R., 409 (1870).

² *Mun Mohinee Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870).

⁴ *Dhundiram Santukram v. Chandanabai*, 2 Bom. H. C. R., 98 (1865).

admitted that he intended to use that money for the purposes of trade, that admission was held sufficient to show that he intended to alienate it. It was possible that the contemplated trade might be successful, but it was also under the circumstances probable that it would not be so, and that the money in suit being spent the plaintiff would be unable to recover that specific object for which it had been brought. If the plaintiff ultimately obtained a decree for this sum of money and the defendant was allowed to take it away in the meantime to invest it in trade, the decree, so far as this particular item of property was concerned, would probably be unfruitful, and the loss likely to accrue to the defendant by its being retained under attachment being comparatively small compared with the difficulty there might be in realizing the sum from the defendant, if once it was expended for any purpose, the Court upheld the Injunction which had been granted against its alienation.¹

Thirdly, the property must be that in suit. Where, however, it was admitted on the part of the plaintiff that one of the defendants was equally interested with herself in the subject of suit, the plaintiff's own case being that she had only an undivided half-share of the property in question; it was *held* that to issue an Injunction which should affect an undivided half-share only was an impossibility; that the Injunction must have the effect of infringing the right of property of the one defendant, who was admitted by the plaintiff to be a part-owner with her; that there was nothing in the case to warrant so extreme a step as that, and therefore that the Injunction which had been granted should be dissolved.²

¹ *Goluck Chunder Gooko v. Mohim Chunder Ghose*, 13 W. R., 95 (1870).

² *Mun Mohinee Dossee v. Ichamoyee Dossee*, 13 W. R., 60 (1870).

Whether a Receiver will be appointed or an Injunction granted in a case of waste or alienation will depend upon the particular facts proved. When in dealing with the question raised before it, the Subordinate Court seemed to have been of opinion that the plaintiffs were entitled to have a Receiver appointed, if it appeared that they had a fair question to raise, and if there was strong ground of apprehension that the property in dispute would be lost or wasted, if not placed in the hands of a Receiver whom it accordingly appointed; it was *held* in appeal that in thus dealing with the matter, the Lower Court had fallen into an error; and that though it would no doubt have been right, if it had made an order for an Injunction, the distinction which exists between the case of an Injunction and Receiver had not been kept in view. That distinction is that while in either case it must be shown that the property should be preserved from waste or alienation in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case a good *prima facie* title has to be made out.' The Appellate Court accordingly set aside the order for the appointment of a Receiver and in lieu thereof granted a temporary Injunction in the terms of the section now considered.

(ii) Fraudulent disposition of property by the defendant *pendente lite*.

If in any suit it be proved by affidavit or otherwise that the defendant threatens, or is about to remove or dispose of *his* property with intent to defraud his creditors, the Court may, by order, grant a temporary Injunction to restrain such act or give such other order for the purpose of staying and preventing the removal or

¹ *Chandidee Jha v. Padmanand* 464, 465 (1895), citing *Kerr on Receivers*, 3-4; *Kerr on Injunction*, 10-11
Singh Bahadur, I. L. R., 22 Cal., 459,

disposition of the property as the Court thinks fit or refuse such Injunction or other order.¹ This provision differs from that enacted by section 492, clause (a) of the Code in that the property dealt with by the Injunction is not the property in dispute in the suit, namely, that to which both parties lay claim and the title to which has to be decided, but is property the title to which is admittedly in the defendant, and, therefore, not in dispute in the suit. It presupposes a general intention on the part of the defendant to defeat and defraud his creditors and permits of an Injunction analogous to the remedy of attachment before judgment provided for in Chapter XXXIV of the Code.² The ordinary rule is that, pending a suit to enforce a general claim against a person there cannot be an Injunction to restrain him from parting or dealing with his property, not being property specifically in dispute in the suit.³ When, however, such intended parting and dealing with property is not done in the *bona fide* exercise of ownership, but with an intent to defraud persons, who being creditors of the owner, have or might have the right to resort to such property in satisfaction of their claim, there arises in their behalf an equity to restrain such threatened dealing with the property even as against its legal owner. Both an attachment under section 483 of the Civil Procedure Code and Injunction under section 492, clause (b) have as their subject-matter not the property in suit, but the property of the defendant; therefore, applications under these sections are clearly distinguishable from an application for an Injunction under section 492, clause (a) against the waste, damage and alienation of

¹ Civ. Pr. Code, s. 492, cl. (b); this clause was first added by the Code of 1877 (Act X of 1877).

² Collett, *op. cit.*, 265.

³ See *Robinson v. Pickering*, 16 Ch. D., 606.

property which is in dispute in the suit. And as applications under section 483 and section 492, clause (b) are both distinguishable from an application under section 492, clause (a), so also, applications under section 483 and section 492, clause (b) respectively, are clearly distinguishable from each other. Section 483 is applicable only to cases where it is probable that the defendant is about to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against him, and empowers the Court in such a case to make an order calling upon the defendant for security, and in default, thereof, to attach the property. It has no application where the property is the *property in suit* which must, if necessary, be followed under the provisions of section 492, clause (a). The latter section applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to damage and make away with any property in dispute in the suit, and empowers the Court in such a case to issue an Injunction to the defendant to refrain from the particular act complained of.¹ But though section 483 and section 492, clause (a), have both this in common that the property to be dealt with by the Court is not that in dispute in the suit, the following important differences exist between these sections. In the first place, the property is actually attached in the one case, while in the other the property is left in the owner's hands subject only to the prohibition enjoined by the Injunction. Secondly, the provisions as to attachment are generally limited to property sufficient to satisfy the decree, which may be passed in the suits in which the application for attachment is made.

¹*Agarwal v. Agarwal*, 6 W. R., Misc., 1 (1906).

Thirdly, there can be no attachment where the property is beyond the jurisdiction of the Court in which the suit is pending.¹ Whereas an Injunction, in so far as its action is *in personam*, is not so limited. Lastly, any private alienation made subsequent to attachment is null and void; but such is not the case with alienations made subsequent to the issue of an Injunction either under clauses (a) or (b) of section 492 of the Civil Procedure Code.²

§ 51.—An appeal lies from an order passed either under clause (a) or clause (b) of section 492 of the Code of Civil Procedure dealt with in this Chapter.⁴ Appeal from such Injunctions.

¹ See O'Kinealy's Civ. Pr. Code, 4th ed., p. 448, and cases there cited.

² *Ib.*, p. 448, and cases there cited.

³ *v. ante*, p. 77, *Delhi and London Bank v. Ramnarain*, L. L. R., 9 All., 497, 499 (1887). [In this case the Lower Court issued an Injunction under s. 492, cl. (b), but the facts

proved do not appear to have warranted the order. That clause requires not only proof of attempted alienation, but of intent to defraud. The High Court appears to have considered that the Injunction was not legally issued, but disposed of the case upon another point.

⁴ Civ. Pr. Code, s. 588, cl. (24).

CHAPTER VI.

INJUNCTIONS IN THE CASE OF OBLIGATIONS ARISING FROM CONTRACT, TRANSFER OF PROPERTY, OR TRUST.

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| <p>§ 52. CONTRACTS, TRANSFERS OF PROPERTY, AND TRUSTS :</p> <ul style="list-style-type: none">(i) Law in India relating thereto;(ii) and the relief applicable in respect thereof. <p>§ 53. RELIEF BY INJUNCTION :</p> <ul style="list-style-type: none">(i) Temporary.(ii) Perpetual.(iii) Mandatory. <p>§ 54. RELIEF BY DAMAGES.</p> <p>§ 55. CONDITIONS UPON WHICH INJUNCTIONS IN CASES OF CONTRACT WILL BE GRANTED :</p> <ul style="list-style-type: none">(i) Jurisdiction;(ii) The agreement must constitute a contract :<ul style="list-style-type: none">(a) Void agreements ;(b) Voidable agreements.(iii) Such contracts must not be one, the performance of which would not be specially enforced :<ul style="list-style-type: none">(a) Contracts which cannot be specifically enforced ;(b) No Injunction will be granted in respect of the breach of such contracts ;(c) Except in certain cases of negative agreements coupled with affirmative agreements not specifically enforceable.(iv) The operation of the law relating to the registration of documents must not be affected. | <p>§ 56. VARIETIES OF COVENANTS :</p> <ul style="list-style-type: none">(i) Affirmative.(ii) Negative.(iii) Affirmative coupled with negative. <p>§ 57. SPECIFIC PERFORMANCE OF AFFIRMATIVE AGREEMENTS.</p> <p>§ 58. INJUNCTIONS IN AID OF AND ANCILLARY TO SPECIFIC PERFORMANCE :</p> <p>§ 59. INJUNCTIONS TO RESTRAIN THE BREACH OF NEGATIVE AGREEMENTS.</p> <p>§ 60. IN THE CASE OF OBLIGATIONS ARISING IN CONTRACT THE COURT WILL BE GUIDED BY THE RULES AND PROVISIONS RELATING TO SPECIFIC PERFORMANCE :</p> <ul style="list-style-type: none">(i) Cases in which specific performance is enforceable ;(ii) Contracts of which the subject has partially ceased to exist ;(iii) Specific performance of part of contract :<ul style="list-style-type: none">(a) where part unperformed is small ;(b) where part unperformed is large ;(c) independent part of contract ;(iv) Liquidation of damages is not a bar to specific performance ; |
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| <p>(v) Of the discretion of the Court;</p> <p>(a) Delay;</p> <p>(b) Unfair advantage;
<i>Callianji Harjivan v. Narsi Tricum</i>;</p> <p>(c) Hardship;</p> <p>(d) Partial performance;</p> <p>(vi) For whom contracts may be specifically enforced;</p> <p>(vii) For whom contracts cannot be specifically enforced:</p> <p>(a) Personal bars to the relief;</p> <p>(b) Contract to sell property by one who has no title or is a voluntary settler;</p> <p>(viii) Non-enforcement except with variation;</p> <p>(ix) Against whom contracts may be specifically enforced;</p> <p>(x) Against whom contracts cannot be specifically enforced.</p> | <p>§ 61. INJUNCTIONS IN CERTAIN PARTICULAR CASES OF CONTRACT OR TRANSFER OF PROPERTY:</p> <p>(i) Injunctions between partners</p> <p>(a) Without a view to dissolution;</p> <p>(b) Pending and after dissolution;</p> <p>(ii) Injunctions against companies</p> <p>(iii) Injunctions against Clubs Societies, &c.;</p> <p>(iv) Injunctions between mortgagor and mortgagee;</p> <p>(v) Injunctions between lessor and lessee.</p> <p>§ 62. INJUNCTIONS IN CASES OF TRUST OR OTHER FIDUCIARY RELATION:</p> <p>(i) Injunctions against trustees;</p> <p>(ii) Injunctions against executors;</p> <p>(iii) Injunctions against corporations.</p> |
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§ 52. Every promise and every set of promises forming the consideration for each other is an agreement; and an agreement enforceable by law is a "contract."¹ "Transfer of property" within the meaning of the Act dealing with the same² (which regulates the transfer of property from one living hand to another as the Indian Succession Act³ regulates its transmission after the owner's death) means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons and to "transfer property" is to perform such act.⁴ A trust is created by the declaration of the author of the trust or by a transfer by him of the trust-property to another as the trustee thereof.⁵ The English law of trusts which is applicable to persons governed by English law in those

Contracts,
Transfers of
Property, and
Trusts.

¹ See Act IX of 1872, s. 2, (c), (h).

² Act IV of 1882.

³ Act X of 1865; as to cases in which that Act does not apply; see

Acts V of 1881 (Probate and Administration) and XXI of 1870 (Hindu Wills).

⁴ See Act IV of 1882, s. 5.

⁵ See Act II of 1882.

parts of India to which the Indian Trusts Act does not extend recognises two estates or interests in the subject-matter of the trust, namely, the "legal" estate of the trustee and the "equitable" estate of the beneficiary or *cestui que trust*. According to that law there may therefore be two persons holding different estates in the same property.¹ But trusts in the sense of confidences to the existence of which a "legal" and an "equitable" estate are necessary are unknown to Hindu and Mahommedan law.² Trusts however in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in, and accepted by, the owner for the benefit of another, are constantly created by the natives of India and are frequently enforced by the Courts. Trusts of various kinds have been recognised and acted upon in India in many cases.³ So also in the territories to which the Indian Trusts Act extends, a "trust" is an obligation annexed to the ownership of property and arising out of a confidence reposed in, and accepted by, the owner, or declared and accepted by him for the benefit of another, or of another and the owner.⁴

(i) Law in India relating thereto.

The law of contract is largely, though not exhaustively, dealt with by the Indian Contract Act.⁵ It does not profess to be a complete Code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law, and there is nothing to show that the Legislature intended to deal exhaustively

¹ See Agnew's Law of Trusts in British India (1882), p. 8; Spence's Equity, 875.

² *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*, 2 B. L. R., O. C., 36 (1868); *Sree Krishnasami Dasi v. Ananda Krishna Bose*, 4 B. L. R., O. C., 231. 278 (1869).

³ *Tagore v. Tagore*, 4 B. L. R., O. C., 34 (1869); S. C. in appeal, 18 W.

R., 359 (1872); *Gazette of India*, Nov. 13, 1890.

⁴ See Act II of 1882, s. 3; see also Act I of 1877, s. 3.

⁵ Act IX of 1872 extends to the whole of British India, and is applicable in all Courts and to people of all races within the British territories. *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76 (1874).

with any particular chapter or sub-division of the law relating to contracts.' It treats of certain general rules applying to all contracts and of certain particular forms of contract such as the sale of goods,² indemnity and guarantee,³ bailment,⁴ agency⁵ and partnership⁶ other than extraordinary partnership⁷ the subject-matter of the Indian Companies' Act.⁸ It does not affect the provisions of any Statute, Act, or Regulation not thereby expressly repealed,⁹ nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of the Act.¹⁰ The Act does not treat at all of certain forms of Contract the substantive law relating to which must be sought for either in special enactments passed prior or subsequent to the Act, or in English text-books.¹¹

¹ *The Irrawaddy Flotilla Co. v. Bhugwandas*, I. L. R., 18 Cal., 620, 628, 629 (1891); the Act purports to be only a partial measure: *Mothoora Kant Shaw v. The India General Steam Navigation Company*, I. L. R., 10 Cal., 184 (1883); *Kuverji Tulsidas v. The Great Indian Peninsula Railway Company*, I. L. R., 3 Bom., 113 (1878). It can hardly be called a complete Code, but it may be taken as a kind of summary of the main principles which govern contracts. *Kandhiya Lal v. Chander*, I. L. R., 7 All., 313, 321 (1884).

² Act IX of 1872, Ch. VII.

³ *Ib.*, Ch. VIII.

⁴ *Ib.*, Ch. IX.

⁵ *Ib.*, Ch. X.

⁶ *Ib.*, Ch. XI.

⁷ *Ib.*, s. 286

⁸ Act VI of 1882.

⁹ See Acts XXXII of 1839 (Interest); XXVIII of 1855; XIV of 1870 (Usury); IX of 1856 (Bills of Lading); Merchant Shipping Act, 1854; Acts I of 1859; V of 1883 (Seamen's Contracts); XIII of 1859 (Breaches of

Contract by Artificers and others; as to criminal breaches of contract, see Penal Code, Ch. XIX); III of 1865 (Common Carriers); Acts V of 1866, Mad. C., VI of 1865, B. C. (Contracts for Labour) and others.

¹⁰ e. g., pre-emption, maritime law as to bottomry, salvage, etc.; attorney's lien (In the matter of *McKorkindale*, I. L. R., 6 Cal., 1 (1880); rules of Hindu law not affected by the Contract or other Act (*Nobin Chunder Bannerjee v. Romesh Chunder Ghose*, I. L. R., 14 Cal., 781 (1887), the common law relating to carriers (*Mothoora Kant Shaw v. The India General Steam Navigation Company*, I. L. R., 10 Cal., 166 (1883); *The Irrawaddy Flotilla Co. v. Bhugwan Das*, I. L. R., 18 Cal., 620 (1891); customs and usages regarding negotiable instruments, etc.

¹¹ Such as insurance, shipping and carriers' contracts, negotiable instruments and others. See as to subsequent Acts, XXVI of 1881 (Negotiable Instruments), XXI of 1883 (Contracts with Emigrants), IX of 1890 (Carriers by Railway), and others.

The law relating to relief in the case of contracts is contained in the Contract Act, in portions of the Civil Procedure Code, and in the provisions of the Specific Relief Act dealing with Injunction and Specific Performance.¹ As to that part of the law of contract which is contained in the Contract Act the English and Indian law are substantially the same. In some respects, however, the Contract Act establishes different rule from that which prevails in England, and in construing it the Courts must not adopt as a rule of construction that it was intended to make the contract law of India the same as the law of England, but must look at the words of the law and gather from them, as well as they can, what was the intention of the Legislature.²

The Transfer of Property Act of 1882³ deals with transfers of property, but, save as provided by section 57 and Chapter IV, does not affect transfers by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction, and nothing contained in the second chapter of that Act affects any rule of Hindu, Mahommedan or Buddhist law. The chapters and sections relating to contracts are to be taken as part of the Indian Contract Act as those which relate to registration are to be read as supplemental to the Registration Act of 1877. The Act after first dealing with the general principles relating to the transfer of property, whether moveable or immoveable by act of parties, treats in particular of sales of immoveable property,⁴ mortgages of, and charges upon immoveable property,⁵

¹ *v. post.*

² *Greenwood & Co. v. Holquette*, 12 B. L. R., 42, 46 (1873); S. C., 20 W. R., 447. Thus in India there is no Statute of Frauds affecting questions of contract and no distinction as to proof of consideration between con-

tracts under real and simple contracts.

³ Act IV of 1882, amended by Act III of 1885.

⁴ *Ib.*, Ch. III.

⁵ *Ib.*, Ch. IV. No provision is made in this Act or in the Contract Act with regard to mortgages or hypo-

leases,¹ exchanges,² gifts³ and transfer of *choses-in-action* or actionable claims.⁴

The Law of Trusts for the territories to which the Indian Trusts Act⁵ extends⁶ is mainly contained in that Act. With some exceptions the law therein contained is substantially the same as that which is now administered by English Courts and (under the name of "justice, equity and good conscience") by the Indian Courts in those territories to which the Act does not extend. Nothing however in the Act contained affects the rules of Mahommedan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors. Portions of the law relating to trusts are also contained in the Specific Relief Act,⁷ the Code of Civil Procedure,⁸ the Limitation Act,⁹ the Official Trustees Act,¹⁰ the Mortgagees and Trustees' Act,¹¹ the Trustees and Mortgagees' Powers Act,¹² the Literary, Scientific, and

theatrical property, and there is no enactment in this country analogous to the English Bills of Sale Acts; see also as to mortgages, Acts XXVII and XXVIII of 1866.

¹ *Ib.*, Ch. V.

² *Ib.*, Ch. VI.

³ *Ib.*, Ch. VII. This chapter saves *donationes mortis causa* (as to which see Act X of 1865, s. 178) and rules of Mahommedans, Hindu and Buddhist law.

⁴ *Ib.*, Ch. VIII.

⁵ Act II of 1882. See Agnew's *Law of Trusts in British India* (1882).

⁶ The Act extends in the first instance to the Madras Presidency, the North-Western Provinces, Punjab, Oudh, Central Provinces, Coorg and Assam.

⁷ Act I of 1877, s. 3; Part II, Ch. I., ss. 10, 11 (a), 12 (a), 21 (e), 42 (*explan.*), 43, 54 (a), 56 (i). Act II of 1882 repeals the first illustration in s. 12.

⁸ Act XIV of 1882, ss. 15, 16, 437, 502, 539.

⁹ Act XV of 1877, ss. 3, 10; Arts. 98, 100, 133, 134.

¹⁰ Act XVII of 1864.

¹¹ Act XXVII of 1866, consolidating and amending the laws relating to the conveyance and transfer of property vested in mortgages and trustees in cases to which English law is applicable.

¹² Act XXVIII of 1866, an Act to give trustees, mortgagees and others in cases to which English law is applicable, certain powers now commonly

Charitable Societies' Act,¹ the Statute of Frauds,² the Religious Endowments Act,³ the Religious Societies' Act,⁴ and the Penal Code.⁵

(ii) and the relief applicable in respect thereof.

The ordinary remedy for the breach of any contract is the grant of compensation for any loss or damage caused by such breach.⁶ A person who rightfully rescinds a contract is also entitled to compensation.⁷ The extraordinary remedies available are Specific Performance,⁸ Rectification,⁹ Rescission,¹⁰ Cancellation,¹¹ Appointment of Receivers¹² and Injunction.¹³ Any person suing for the specific performance of a contract may also ask for compensation for its breach either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.⁴ Compensation awarded under the section now cited may be assessed in such manner as the Court may direct.

inserted in settlements, mortgages and wills, and to amend the law of property and relieve trustees. In those parts of India to which Act II of 1882 extends, ss. 2—5, 32—37, and the portions of ss. 39 and 43 dealing with trusts are repealed; but Act II of 1882 embodies and re-enacts the substance of ss. 2, 3, 5, 32, 33, 36, 37, and those portions of ss. 39 and 43 dealing with trusts.

¹ Act XXI of 1860.

² 29 Car. II, c. 3, ss. 7—11, relating to declarations of trust, resulting trusts, transfer of trusts, and *cestui que trust* are in force only in the Presidency-towns of Calcutta and Bombay.

³ Act XX of 1863.

⁴ Act I of 1890.

⁵ Sec. 405—409.

⁶ Act IX of 1872, ss. 73, 74.

⁷ *Ib.*, s. 75.

⁸ Act I of 1877, Ch. II. Except where otherwise expressly enacted nothing in the Specific Relief Act shall be deemed to deprive any person of any right to relief other than Specific Performance (*ib.*, s. 4), but the dismissal of a suit for specific performance bars a suit for damages (*ib.*, s. 29).

⁹ *Ib.*, Ch. III.

¹⁰ *Ib.*, Ch. IV.

¹¹ *Ib.*, Ch. V.

¹² *Ib.*, Ch. VII; Civ. Pr. Code, Ch. XXXVI.

¹³ Act I of 1877, Chapters, IX and X; Civ. Pr. Code, Ch. XXXV.

¹⁴ Act I of 1877, s. 19.

The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.¹ The dismissal of a suit for specific performance of a contract or part thereof will bar the plaintiff's right to sue for compensation for the breach of such contract or part as the case may be.² Liquidation of damages is not a bar to specific performance.³

Similarly in the case of agreements to transfer property the remedy lies either in damages or specific performance. Instruments of transfer may also be rectified or cancelled, and protection may be given to rights of property by the appointment of a Receiver or the issue of an Injunction. A person entitled to the possession of specific property, moveable or immoveable, may sue to recover the same;⁴ and any person entitled to any right as to any property may institute a suit to obtain a decree declaratory of such right.⁵ In the case of mortgages the mortgagor may sue for redemption and the mortgagee for sale or foreclosure.⁶

In the case of trusts a trustee who commits a breach of trust is liable to make good the loss which the trust-property or the beneficiary has thereby sustained.⁷ The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such and restrained by Injunction from committing any contemplated or probable breach of trust.⁸ He may follow the trust-

¹ *Ib.*

² *Ib.*, s. 29.

³ *Ib.*, s. 20.

⁴ Act I of 1877, Part II, Ch. I.

⁵ *Ib.*, Ch. VI.

⁶ Act IV of 1882, Ch. IV as to sales and exchanges, *ib.*, Ch. III, s. 120; Leases, Ch. IV; Gifts, Ch. VII; Transfer of Actionable Claims, Ch.

VIII.

⁷ Act II of 1882, ss. 23—30, 33; as to liability of beneficiary joining in breach of trust, *ib.*, s. 68.

⁸ Act II of 1882, s. 61. (Act I of 1877, ss. 54 (a) [Injunction], 12 (a) [Specific Performance],) Chapters II, IX and X *passim*; Civ. Pr. Code, Ch XXXV.

property,¹ and institute a suit for a declaration of his right,² and the trustee, if dispossessed of the trust-property, may sue to recover the same.³ The Court will also in proper cases dispossess a trustee of the trust-estate by appointing a Receiver of the trust-property.⁴

Of the abovementioned forms of relief only those by Injunction and Receiver are directly dealt with in the following pages though incidental reference is also made to relief by Specific Performance, since the rules touching this remedy govern also the issue of Injunctions in cases of breach of contract.⁵

Injunctions in respect of torts to property other than breaches of trust are dealt with in subsequent Chapters.

✓ Relief by Injunction.

§ 53. The Court will often interfere by Injunction to prevent the violation of contracts and to compel parties to perform their covenants and agreements. In the case of the breach of an obligation arising from contract or trust, an Injunction, temporary or perpetual, mandatory or otherwise, may be granted.

✓ (i) Temporary.

In any suit for restraining the defendant from committing a breach of contract or other injury (such as a breach of trust) whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary Injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The Court may by order

¹ Act II of 1882, ss. 63, 64, *et seq.*, s. 96 and Ch. VI *passim*. See Act XV of 1877 (Limitation), s. 10.

² Act I of 1877, s. 42.

³ *Ib.*, Part II, Ch. I; see further as to the rights and powers of trustees,

Act II of 1882, ss. 31—45.

⁴ Civ. Pr. Code, Ch. XXXVI; Act I of 1877, Ch. VII; as to suits relating to public charities, see Civ. Pr. Code, s. 539.

⁵ Act I of 1877, s. 54.

grant such Injunction on such terms as to the duration of the Injunction keeping an account, giving security or otherwise as the Court thinks fit, or refuse the same.¹

Where any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, the Court may by order grant a temporary Injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging or alienation as the Court thinks fit, or refuse such Injunction or other order.² In case of disobedience an Injunction granted may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property or both. But no such attachment shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the Injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.³

The words of the Code will enable the Courts to cast their orders in a mandatory form, if the circumstances of the case so require it.

Subject to the other provisions contained in or referred to by Chapter X of the Specific Relief Act, a perpetual Injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract the Courts are required to guide themselves by the rules and provisions contained in Chapter II of the Act relating to the subject of specific performance.⁴ The

¹ Civ. Pr. Code, s. 493.

² *Ib.*, s. 492.

³ *Ib.*, s. 493.

⁴ Act I of 1877, s. 54; see Kerr, *Int.*, 480, 481. The rule, however,

there referred to, that a breach of covenant is in itself apart from damage a ground for Injunction, seems not to be law in this country; *v. post.*

contract may be expressed or it may be implied.¹ Of the illustrations to section 54 of the Specific Relief Act dealing with the issue of perpetual Injunctions, Illustrations (a), (j), (k), (l), are purely cases of contract.² Provision is also made for the issue of an Injunction in the case of a breach of trust. When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual Injunction where the defendant is trustee of the property for the plaintiff.³ Of the illustrations to the abovementioned section those lettered (b)—(i) are examples of breaches of duty arising out of contract or trust, being breaches of trust or other fiduciary relation.⁴

A perpetual Injunction being in substance a decree, such an Injunction in the case of contract or trust should be enforced by the execution of the decree by which it is given.⁵

(iii) Mandatory.

When, to prevent the breach of an obligation arising from contract, trust, or otherwise, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant a perpetual Injunction to prevent the breach complained of, and also to compel performance of the requisite acts.⁶ The Court may also, if the circumstances so require it, grant a temporary Injunction in the mandatory form.⁷ The mode of enforcement of a mandatory Injunction depend upon its nature as being either temporary or perpetual. A mandatory injunction may be granted to restrain

¹ *Ib.*, illust. (k) v. *post*.

² Collett, *op. cit.*, 278; Nelson, *op. cit.*, 281.

³ Act I of 1877, s. 54 (a).

⁴ Collett, *op. cit.*, 278; Nelson, *op. cit.*, 281.

⁵ *Jawari v. H. A. Emile*, I, L. R.,

13 All., 98 (1890); see Civ. P. Code, s. 260, & *ante*, p. 77.

⁶ Act I of 1877, s. 55.

⁷ Civ. Pr. Code, ss. 492, 493, by which the form of the order or Injunction is left to the discretion of the Court.

a breach of contract, if the circumstances warrant its issue. But there must have been no acquiescence and the consequences of the breach of the agreement must be such as cannot adequately be compensated by damages.¹

So where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall: It was *held* that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, was not sufficient in itself to justify the Court in granting a mandatory Injunction ordering its removal. It should also be satisfied that the new wall so materially interfered with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement could not adequately be compensated by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case, the Court should only award damages.²

A mandatory Injunction may also be granted in the case of breaches of trust or other fiduciary relation. So in the case put as illustration (i) to section 54 of the Specific Relief Act, the Court may also order all written communications made by B, as patient to A, as medical adviser, to be destroyed.³ And if a person, being the medical adviser of another, threaten to publish the latter's written communications with him, showing that he has led an immoral life,

¹ *Ranchhod Jammadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873).

See also *Mandatory Injunctions*, Kerr, Inj., 480—484.

² *Ranchhod Jammadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873).

³ Act I of 1877, s. 55, illus. (c).

the latter may obtain an Injunction to restrain the publication;¹ and the Court may also order the communication to be given up or destroyed.²

Relief by damages.

§ 54. The Court may, when it is satisfied that such a course will be justified by the circumstances of the case, instead of granting an Injunction, substitute damages therefor.³ But a person may by acquiescence in a breach of covenant not only deprive himself of his right to an Injunction, but also of his right to recover damages.⁴

Conditions upon which Injunctions in cases of contract will be granted.

§ 55. Certain common conditions are essential to the grant of relief in respect of obligations arising from contract, viz.:—(1) the Court must be one of competent *jurisdiction* to grant the relief prayed; (2) the agreement must constitute a *contract*; (3) such contract must not be one the performance of which would not be *specifically* enforced; and (4) the grant of relief must not affect the operation of the Indian Registration Act.

(i) Jurisdiction.

In this country the power to make orders *in personam* though the subject-matter of the suit is without the jurisdiction is determined in the case of the High Courts by their respective Letters Patent,⁵ and in the case of other Civil Courts, by the Civil Procedure Code.⁶ Suits respecting immoveable property must in general be instituted where the subject-matter is situate; in other cases the jurisdiction is determined by the place of origin of the cause of action or residence of the defendant.⁷ It is doubtful whether the Courts in this country are empowered to entertain suits for specific performance of contracts

¹ Act 1 of 1877, s. 55, illus. (f).

² *Ib.*, illus. (g).

³ See *Leader v. Moody*, 20 Eq., 154 and *ante*.

⁴ *Kelsey v. Dodd*, 52 L. J. Ch., 34.

⁵ Letters Patent, 1865 (Calcutta) cl. 12.

⁶ Civ. Pr. Code, ss. 16, 16A., v. *ante*, §§ 19—22.

⁷ *Ib.*, s. 17; Letters Patent, 1865, cl. 12.

relating to land which is situate without the jurisdiction.¹ The decisions cited were the subject of consideration in the case undermentioned² in which it was pointed out that there is a distinction between a vendor's suit for specific performance as to which the Court has jurisdiction and a purchaser's suit as to which a Court may not have jurisdiction.³ In the matter of Injunctions suits under the Civil Procedure Code to obtain relief respecting immoveable property situate in British India held by or on behalf of the defendant,⁴ may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within whose jurisdiction the property is situate or in the Court within whose jurisdiction the defendant resides or carries on business or personally works for gain.⁵ Similarly it has been held under the High Court Charter that where the suit is exclusively directed *in personam*, and the person against whom relief is sought is within and subject to the jurisdiction, the Court will have jurisdiction to grant an Injunction.⁶ In cases, therefore, other than those substantially falling within the scope of suits respecting immoveable property or suits "for land," the Court will have jurisdiction to grant an

¹ In *Bamdhone Shaw v. Sreemutty Nobumoney Dossee*, Bourke, 218 (1865); *H. H. Holkar v. Dadabhai*, I. L. R., 14 Bom., 353 (1890), the Court was held to have, and in *Greenath Roy v. Cally Doss Ghose*, I. L. R., 5 Cal. 82 (1879), not to have jurisdiction.

² *Land Mortgage Bank v. Sudur-uddeen Ahmad*, I. L. R., 19 Cal., 358, 366 (1892).

³ On the basis of the classification suggested it would appear that a vendor's suit will lie (I. L. R., 19 Cal. 358); that a purchaser's suit will lie in Bombay (I. L. R., 14 Bom., 353), but it is doubtful whether that be so

in Calcutta since it has been held both that such a suit will (Bourke, 218) and will not (I. L. R., 5 Cal., 82) lie. The decision in the last case appears to have been *obiter*, and the most recent decision (I. L. R., 19 Cal., 353) did not decide the point. The English Courts have jurisdiction in either case. Story, Eq. Jur., §§ 743, 744 see *Keshav v. Vinayak*, I. L. R., 23 Bom., 22, 31 (1897).

⁴ *Crisp v. Watson*, I. L. R., 20 Cal., 689 (1893).

⁵ Civ. Pr. Code, s. 16.

⁶ *Rajmohun Bose v. East Indian Railway Co.*, 10 B. L. R., 241 (1872) *v. ante*, pp. 50—54.

Injunction, if the cause of action has arisen or the defendant resides, carries on business or works for gain within the jurisdiction.¹

ii) The agreement must constitute a contract.

The agreement in respect of which relief by specific performance or Injunction is sought must constitute a *contract*, that is² an agreement enforceable by law; for by the terms of the Specific Relief Act nothing in that Act shall be deemed, (unless otherwise expressly enacted therein,) to give any right to relief in respect of any agreement which is not a contract.³ Every promise and every set of promises forming the consideration for each other is an *agreement*.⁴ And all agreements are *contracts* if they are made by the free consent⁵ of parties competent to contract,⁶ for a lawful consideration and with a lawful object,⁷ and are not by the Contract Act expressly declared to be void.⁸

The effect of the failure of one or other of the conditions last mentioned is either to render the agreement *void*, that is,⁹ not enforceable by law, and therefore¹⁰ not a contract, or to render it *voidable*, that is,¹¹ enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, and an agreement of this kind is a voidable contract.

¹ Civ. Pr. Code, s. 17 (See also ss. 18—24); Letters Patent, 1865, cl. 12.

² Act IX of 1872 (Contract), s. 2 (h).

³ Act I of 1877, s. 4 (a).

⁴ Act IX of 1872, s. 2 (c) and as to the definition of 'promise,' 'promisor,' 'promisee,' see *ib.*, s. 2, cl. (b), (c), and of 'consideration' see *ib.*, s. 2, cl. (d). Promises which form the consideration for each other are called reciprocal promises, *ib.*, cl. (f).

⁵ *v. ib.*, ss. 13—18.

⁶ *v. ib.*, s. 11. Every person is competent to contract, who is of the

age of majority (see Act IX of 1875), and who is of sound mind (see Contract Act, s. 12), and who is not disqualified from contracting by any law to which he is subject (*ib.*, s. 11). Every person competent to contract and entitled to or authorized to dispose of transferable property is competent to transfer that property. (Act IV of 1882, s. 7.)

⁷ *v. ib.*, ss. 23, 25, expl. (2).

⁸ *Ib.*, s. 10, and see as to void agreements, *ib.*, ss. 24—30.

⁹ Act IX of 1872, s. 2 (g).

¹⁰ *Ib.*, s. 2 (h).

¹¹ *Ib.*, s. 2 (i).

The Specific Relief Act excludes from its operation all void agreements, and therefore no Injunction will be granted in respect of such an agreement.¹ Every agreement of which the object or consideration is unlawful is void;² as where the consideration or object of an agreement is forbidden by law, or is of such a nature that, if permitted, it would defeat the provision of any law; or is fraudulent or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.³ And except in the three instances specified by the Contract Act an agreement made without consideration is void.⁴ So too an agreement in restraint of the marriage of any person, other than a minor is void.⁵ And, saving three specified exceptions, an agreement in restraint of trade is void;⁶ as also, saving two exceptions, an agreement in restraint of legal proceedings.⁷ Further, agreements, the meaning of which is not certain, or capable of being made certain⁸ and agreements by way of wager are void.⁹ Lastly, where *both* the parties to an agreement are under a mistake as to a matter of *fact* essential to the agreement, the agreement is void.¹⁰

Thus when an Act has declared an association to be illegal, no rights can be acquired by any of its members which are founded upon that which is so declared to be illegal nor will the Court take notice of their agreement for the purpose of establishing a right in a Court of law.¹¹ An association of artisans for the purpose of enhancing the price of their work by bringing all the business of the

¹ Act I of 1877, s. 4, cl. (a).

² Act IX of 1872 (Contract), s. 23.

³ *Ib.*, an agreement is void if the consideration or object is unlawful in part, *ib.*, s. 24.

⁴ *Ib.*, s. 25.

⁵ *Ib.*, s. 26.

⁶ *Ib.*, s. 27 v. *post*, p. 249.

⁷ *Ib.*, s. 28.

⁸ *Ib.*, s. 29.

⁹ *Ib.*, s. 30.

¹⁰ *Ib.*, s. 20, and see *ib.*, ss. 21, 22.

¹¹ *Harris v. Amery*, L. R., 1 C. P., 148, cited and followed in *Bhikaji Sabaaji v. Bapu Saju*, I. L. R., 1 Bom., 550, 554 (1877).

trade into one shop and dividing the prices of the work done amongst the members according to their skill, is an association that has for its object the acquisition of gain and, if consisting of more than twenty persons, must be registered. When more than twenty artizans signed an agreement whereby they constituted themselves an association for the above purpose, but which association was not registered as a company under the provisions of section 4 of Act X of 1866 (Trading Companies),¹ it was held that the Court could not grant an Injunction to restrain the breach of such agreement.² In this case there was a partnership, or, at any rate, an association, for the purpose of carrying on a business that had for its object the acquisition of gain, and consisting of more than twenty persons, and being unregistered, it was an illegal association. Therefore none of the parties acquired any rights under their agreement which could be enforced in a Court of law.

(b Voidable agreements.

Though the Specific Relief Act excludes from its operation void agreements, it does not so exclude voidable agreements, for such are contracts, being enforceable by law, though at the option of some or one of the parties only;³ such as agreements made without free consent, being induced by coercion, undue influence, fraud, or misrepresentation;⁴ contracts as to which one of the parties thereto has refused to perform his promise wholly;⁵ or has prevented the other from performing his promise;⁶ or has failed to perform his part at a fixed time when time is of the essence of the contract.⁷ The subject-matter of Injunctions therefore in the case of obligations arising

¹ Repealed by Act VI of 1882; corresponding with s. 4, Act VI of 1882 (Indian Companies).

² *Bhikaji Sabaji v. Bapu Saju*, I. L. R., 1 Bom., 550 (1877).

³ Act IX of 1872, s. 2 (A), (i).

⁴ *Ib.*, s. 19.

⁵ *Ib.*, s. 39.

⁶ *Ib.*, s. 53.

⁷ *Ib.*, s. 55.

out of contract are agreements bilaterally binding and voidable agreements which the parties who have the power to avoid them have elected to make binding. The distinction between a void and a voidable agreement is that that which is void has never had any legal existence and can therefore never be confirmed; while that which is voidable is valid as long as it is not impeached by the party, who has it in his power to avoid it.¹ But, though valid, a contract so long as it is voidable cannot be specifically enforced.² In the event of a person electing to treat the contract as a binding one he may sue for its specific performance, and may also ask for compensation for its breach, either in addition to, or in substitution for, such performance,³ or if he so chooses may sue for damages only.⁴ And if the person at whose instance the contract is voidable has elected to ratify it, and to treat it as binding upon himself a suit for specific performance and Injunction may lie against him in respect of such contract. But as a minor cannot elect to ratify a contract so as to be bound by the ratification no decree for specific performance can be made against him;⁵ and it would follow therefore that an Injunction cannot be granted to prevent the breach of a contract entered into by a minor.⁶

The agreement in respect of the breach of which an Injunction is sought must not only constitute a contract, but such contract must not be one which, though of an affirmative character, is incapable of specific performance.

(iii) Such contract must not be one, the performance of which would not be specifically enforced.

¹ *Chesterfield v. Janssen*, 1 White and Tudor's L. C.; *Oakes v. Turquand*, L. R., 2 H. L., 375.

² *Jugul Kishori Chowdhurani v. Anunda Lal Chowdhuri*, I. L. R., 22 Cal., 545, 550 (1895).

³ Act I of 1877, s. 19.

⁴ *Ib.*, s. 4, cl. (b).

⁵ *Jugul Kishori Chowdhurani v. Anunda Lal Chowdhuri*, I. L. R., 22

Cal., 545, 549, 550 (1895); and in *Flight v. Bolland*, 4 Russ., 298, it was held that an infant could not maintain a suit for specific performance, the remedy not being mutual cited *ib.*, 549; and if the contract be entered into by a guardian it must be shown that it was for infant's benefit, *ib.*

⁶ Act I of 1877, s. 56, cl. (f).

When an Injunction is sought in respect of an obligation arising from contract, the Court is to be guided by the rules and provisions contained in the Specific Relief Act relating to Specific Performance.¹ It follows as a necessary deduction from this rule that an Injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced.² When specific performance will not be granted, the Court will not grant an Injunction in aid of the contract, for, while damages are the proper and available remedy, such an Injunction might practically effect the same results as a decree for specific performance.

The following contracts cannot be specifically enforced, and therefore an Injunction cannot be granted in respect of their breach :—

(a) Contracts which cannot be specifically enforced.

(a) A contract for the non-performance of which *compensation in money is an adequate relief*.³ The grant of specific relief being dependent upon the inadequacy of the ordinary legal remedy, specific performance and Injunction will in all cases be refused where the breach of contract is satisfied by the mere payment of money.⁴

¹ Act I of 1877, s. 54.

² *Ib.*, 56 (f), as to the exception contained in s. 57. *v. post.* See High, *Inj.*, § 1162; Joyce's Doctrines, 204. So an injunction will not be granted against the sale of goods or any chattels where specific performance of a contract for their sale cannot be enforced, *ib.*; *Fothergill v. Rowland*, 22 W. R., (Eng.), 42.

³ Act I of 1877, s. 21, cl. (a) this is the converse proposition of s. 12, cl. (c). *ib.*, see also explanation to s. 12 *ib.*, s. 54 *ib.* (c).

⁴ Fry on Specific Performance, §§ 66—71; Kerr, *Inj.*, 428, 429, and see *Maya Ram v. Prag Dai*, I. L. R.,

5 All., 44, 51 (1882); *Ryan v. Mutual Tontine Westminster Chambers Association*, L. R., 1893, 1 Ch., 116; *Ranchhod Jamnadas v. Lalla Haribhai*, 10 Bom. H. C. R., 95 (1873); In the matter of *Gunpat Narain Singh*, I. L. R., 1 Cal., 74, 76 (1875); *Haji Abdul Allarakhi v. Haji Abdul Backa*, I. L. R., 6 Bom., 5, 7 (1881); *Callianji Harjivan v. Narsi Tricum*, I. L. R., 19 Bom., 764, 769, 770 (1895); *aliter* if a money payment is insufficient *Madras Railway Co. v. Rust*, I. L. R., 14 Mad., 18, 22 (1899) In re *Parkin Hill v. Schwarz*, L. R., 1892, 3 Ch., 510.

So specific performance will not be enforced of a contract for the transfer of stock in the public funds, though the rule is otherwise in the case of shares in private companies.¹ Thus if *A* contracts to sell, and *D* contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India, the contract cannot be specifically enforced.² So the Court for the most part refuses to interfere in respect of chattels:³ and *prima facie* the breach of any purely mercantile contract is capable of being adequately relieved by damages.⁴ Thus if *A* contracts to sell, and *B* contracts to buy, 40 chests of indigo at Rs. 1,000 per chest, the contract cannot be specifically enforced:⁵ nor will the Court enforce contracts to make or accept a loan of money; though where the money has been actually advanced the Court will specifically enforce a contract to execute a mortgage.⁶ So if in consideration of certain property having been transferred by *A* to *B*, *B* contracts to open a credit in *A*'s favour to the extent of Rs. 10,000, and to honour *A*'s drafts to that amount; the contract cannot be specifically enforced.⁷ In the first and second of the above illustrations both *A* and *B*, and in the third *A*, would be reimbursed by compensation in money.

(b) A contract which runs into such *minute or numerous details*, or which is so dependent on the *personal qualifications or volition of the parties* or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms.⁸

¹ Fry, *op. cit.*, §§ 73, 76.

² Act I of 1877, s. 21, illus. (1) to cl. (a).

³ Fry, *op. cit.*, § 78 as to unique chattels, see s. 12, Act I of 1877.

⁴ *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5, 7

(1981).

⁵ Act I of 1877, s. 21, illus. (2) to cl. (a).

⁶ Fry, *op. cit.*, § 54.

⁷ Act I of 1877, s. 21, illus. (3) to cl. (a).

⁸ Act I of 1877, s. 21, cl. (b).

“The terms of this clause are very wide, and the number of Illustrations show how varied are the circumstances which render it practically impossible for the Courts to specifically enforce contracts. Though the clause mentions two special reasons yet the inability of the Court to enforce specific performance is not limited to these two special grounds, for the clause goes on to speak of a contract which *otherwise from its nature is such* that the Court cannot enforce specific performance of its material terms. The whole question is a *practical* one, and it is obviously impossible, in the face of the enormous diversity of facts and circumstances about and under which contracts take place, to lay down a rigid rule which can embrace all possible contingencies. No doubt the Courts could, at a great expenditure of time and money, specifically enforce nearly every contract, but such a course is neither necessary, for there is always pecuniary compensation available for the injured party, nor would it in many cases be desirable on the ground of public policy. The line must be drawn somewhere, and it is drawn at *practical* impossibility, and whether this exists or not must be judged on the facts and circumstances of each case, as it arises.”¹ The reason for refusal of specific relief is thus the practical incapacity of a Court to execute in such cases a decree for specific performance. Thus *A* contracts to render personal service to *B*: or *A* contracts to employ *B* on personal service: or *A*, an author, contracts with *B*, a publisher to complete a literary work. *A* contracts with *B* that, in consideration of Rs. 1,000 to be paid to him by *B*, he will paint a picture for *B*. *A* contracts to marry *B*. *A* contracts to buy *B*'s business at the amount of a valuation to be made by two valuers, one to be named by *A*

¹ Nelson's Specific Relief Act, 165.

and the other by *B*. *A* and *B* each name a valuer, but before the valuation is made *A* instructs his valuer not to proceed.¹ The abovementioned contracts cannot be specifically enforced as they are all dependent upon the personal qualifications or volition of the parties. The Courts will not enforce contracts of hiring and service, and agency for the enforced performance of such a contract would be worse than its non-performance,² nor will an Injunction be granted in the abovementioned cases. So an Injunction will not be granted in respect of a breach of promise to give in marriage;³ or to compel a person to retain another in his employ in the confidential position of an agent;⁴ and in such a case the Court will not restrain a defendant from doing that which is only a violation of what is ancillary to, or incidental to the principal part of the contract.⁵ Again a contract will not be enforced which runs into such minute or numerous details or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms. By a charter-party entered into in Calcutta between *A*, the owner of a ship, and *B*, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London. *A* lets land to *B* and *B* contracts to cultivate it in a particular manner for

¹ Act I of 1877, s. 21, cl. (b), illustrs. (1)–(4), (8), (12); as to last cited illus., see *Vickers v. Vickers*, L. R., 4 Eq., 329, Fry, *op. cit.*, §§ 361, 364.

² Fry, *op. cit.*, §§ 110–115. Illustrs., (3) and (8) apply the same principle to professional contracts made by authors and artists. *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266 (1891); *Callianji Harji-*

van v. Narsi Tricum, I. L. R., 18 Bom., 702 (1894) S. C. in appeal, I. L. R., 19 Bom., 764 (1895).

³ In the matter of *Gunput Narain Singh*, I. L. R., 1 Cal., 74, 76 (1875); *Umed Kika v. Nagindas*, 7 Bom. H. C. R., O. C. J., 122 (1870).

⁴ *Nusserwanji Merwanji Panday v. Gordon*, *supra*, Kerr, *Inj.*, 429.

⁵ *Ib.*

three years next after the date of the lease.¹ *A* and *B* contract that in consideration of annual advances to be made by *A*, *B* will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to *A* when cut and ready for delivery. *A* contracts to supply *B* with all the goods of a certain class which *B* may require. *A* contracts with *B* to take from *B* a lease of a certain house for a specified term, at a specified rent, "if the drawing-room is handsomely decorated."² *A* contracts with *B* to execute certain works which the Court cannot superintend.³ None of these or other similar contracts⁴ can be specifically enforced : nor can an Injunction be granted in respect of their breach.

"By the last illustration the law is left in much the same uncertainty as the numerous and conflicting decisions in English Equity on contracts to build and repair have left it ; for the real question is what is the limits of the Court's capacity for *superintendence*.⁵ The second Illustration to clause (c), section 12 and the Illustration to section 22 III (of the Specific Relief Act) show that a Court is considered competent to superintend some rather complicated works. But both these examples contain this element, that the plaintiff having parted with his land had no opportunity of doing the work which the defendants had contracted to do, and so ascertaining the amount of damages sustained by their non-performance, even if damages would anyhow be an adequate compensation.⁶ The Illustration to clause (c) of

¹ See *Bayner v. Stone*, 2 Eden, 128.

² See *Taylor v. Portington*, 7 DeG. M. & G., 328.

³ Act I of 1877, s. 21, illustrns. (5) —(7), (9)—(11).

⁴ *Fry, op. cit.*, §§ 90—93.

⁵ See *Ryan v. Mutual Tontine Westminster Chambers Association*, L. R., 1893, 1 Ch., 123, 125.

⁶ See *Storer v. G. W. Ry. Co.*, 1 Y. & C., CC, 48 ; *Price v. Pessano*, 4 Hare, 506.

section 12 assumes that the Courts in India may (as the Scotch Courts do) appoint some qualified person under whose superintendence the work is directed to be executed.¹ Obviously, however, there must be a limit to the exercise of this power, and it is now settled that subject to certain exceptions the Court will not specifically enforce contracts to build or repair or grant an Injunction in respect thereof.²

(c) A contract the terms of which the Court cannot find with *reasonable certainty* cannot be enforced by specific performance or Injunction, it being necessary to ascertain what is the contract which is to be performed. Thus, *A*, the owner of a refreshment-room, contracts with *B* to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. *A* refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.⁴ It is not possible to lay down any general rule as to what is sufficient certainty in a contract; but the certainty required must be a reasonable one having regard to the subject-matter of the contract and the circumstances under which and with regard to which it was entered into.⁵

(d) The same rule applies to a contract which is in its nature *revocable*.⁶ The interference of the Court in such a case would be idle, inasmuch as what it had done might be instantly undone by one of the parties.⁷ So where *A* and *B* contract to become partners in a certain business, the

¹ Collett, *op. cit.*, 104, 105.

See rule stated with its exceptions in Fry, *op. cit.*, §§ 98—109; Kerr, *Inj.*, 429.

² Act I of 1877, s. 21, cl. (c); Fry, *op. cit.*, § 380; Kerr, *Inj.*, 429.

⁴ *Id.*, *ibid.* to cl. (c) see *Paris*

Chocolate Co. v. Crystal Palace Co., 3 Sm. and Giff., 119.

⁵ Fry, *op. cit.*, §§ 380—386; see *New Beerbhorn Coal Co. v. Bularum Maitt.*, I. L. R., 5 Cal., 932 (1880).

⁶ Act I of 1877, s. 21, cl. (d).

⁷ Fry, *op. cit.*, § 94, *et seq.*

contract not specifying the duration of the proposed partnership, this contract cannot be specifically performed, for, if it were so performed, either *A* or *B* might at once dissolve the partnership.¹

(e) No specific relief will be given in respect of a contract made by trustees either in excess of their powers or in breach of their trust.² Thus *A* is a trustee of land with power to lease it for seven years. He enters into a contract with *B* to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.³ So where the Directors of a company have power to sell the concern with the sanction of a general meeting of the share-holders, and they contract to sell it without any such sanction, this contract cannot be specifically enforced.⁴ And if two trustees, *A* and *B*, empowered to sell trust-property worth a lakh of rupees, contract to sell it to *C* for Rs. 30,000, the contract being so disadvantageous as to be a breach of trust, *C* cannot enforce its specific performance.⁵ Again the promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and, in fact, agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.⁶

¹ Act I of 1877, s. 21, illus. to cl.(d).

² *Ib.*, cl. (e); Fry, *op. cit.*, §§ 407—414; for definition of "trust" and "trustee" and "breach of trust," see Art II of 1882 dealing with private trusts (v. *ante*, pp. 213, 217) as to the duties and powers of trustees, *ib.*, Chs. III, IV.

³ Act I of 1877, s. 21, illus. (1) to

cl. (e) see *Harnet v. Yielding*, 2 Sch. and L., 549.

⁴ *Ib.*, illus. (2) to cl. (e). See *Daniel v. Adams*, Amb., 495.

⁵ *Ib.*, illus. (3) to cl. (e). See *Mortlock v. Buller*, 10 Ves., 292.

⁶ *Ib.*, illus. (4) to cl. (e). See *Emma Silver Mining Co. v. Grant*, 11 Ch. D., 918. A promoter is in a

(f) Contracts which are *ultra vires* are void, and therefore a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers, cannot be specifically enforced. So if a company existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon, this contract cannot be specifically enforced.¹

(g) The breach of a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date cannot be specifically relieved against. The Court refuses to order the performance of continuous acts on the ground that the Court cannot see to and enforce such performance. Thus *A* contracts to let for twenty-one years to *B* the right to use such part of a certain railway made by *A* as was upon *B*'s land, and that *B* should have a right of running carriages over the whole line on certain terms, and might require *A* to supply the necessary engine-power, and that *A* should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to *B*.²

(h) A contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist, cannot be specifically enforced. So if *A* contracts to pay an annuity to *B* for the lives of *C* and *D* and it turns out that, at the date

fiduciary relation to the company which he promotes. *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. D., 118.

¹ Act I of 1877, s. 21, cl. (f); Fry, *op. cit.*, §§ 487—495, 246, *et seq.*

² *Ib.*, cl. (g), a clause closely connected in its subject-matter with cl.

(b) *ante*. See Fry, *op. cit.*, § 99, *Ryan v. Mutual Tontine Westminster Chambers Association*, L. R., 1893, 1 Ch., 118; if the contract be for less than three years, relief will yet be refused if, as it well may, the case falls within cl. (b) of s. 21.

of the contract *C*, though supposed by *A* and *B* to be alive, was dead, the contract cannot be specifically performed.¹

And, save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration will be specifically enforced; but if any person who has made such a contract, and has refused² to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract will bar the suit.³ The contract the existence of which would bar a suit must be an operative contract, and not a contract broken up by the conduct of all the parties to it.⁴ The wording of the section is wide enough to cover contracts to refer any matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court.⁵ The ground upon which this rule proceeds is that it is deemed to be against public policy to exclude from the appropriate judicial tribunals of the State any persons who, in the ordinary course of things, have a right to sue there.⁶ Upon the same principle agreements in restraint of legal proceedings are, saving certain contracts to refer to arbitration, void.⁷ The Code of Civil Procedure, however, provides for the carrying out of certain agreements to refer disputes to arbitration,⁸ and for the execution of

¹ Act I of 1877, s. 21, cl. (A). Fry, *op. cit.*, § 900 *et seq.*; as to mistake, see Contract Act, s. 20.

² It must be proved that there has been a refusal; the mere filing of a suit does not constitute such a refusal, *Tahal v. Bisheshkar*, I. L. R., 8 All., 57 (1885); *Koomud Chunder Dass v. Chunder Kant Mookerjee*, I. L. R., 5 Cal., 498 (1879); but an application for leave to withdraw from the arbitration is evidence of such refusal, *Shocambat v. Deolat*, I. L. R., 9 All.,

168 (1886).

³ Act I of 1877, s. 21. See *Satig Ram v. Jhunna Kumar*, I. L. R., 4 All., 546 (1882).

⁴ *Tahal v. Bisheshkar*, *supra*.

⁵ *Shocambat v. Deolat*, I. L. R., 9 All., 168 (1886).

⁶ Story, Eq. Jur., ss. 1457, 670; Fry, *op. cit.*, § 1600 and footnote (2) *et seq.*

⁷ Act IX of 1873 (Contract), s. 28.

⁸ Civ. Pr. Code, ss. 523, 531.

an award already made under any agreement to refer to arbitration.' "But in each case this is done by moulding the matter into the form of a suit between the parties, and then dealing with it under the rules for arbitration or awards in the course of ordinary suits." ¹

Awards are, however, as regards specific performance placed on the same footing as contracts,² for an "award supposes an agreement between the parties and contains no more than the terms of that agreement ascertained by a third person."³ The provisions therefore of the Specific Relief Act relating to contracts apply, *mutatis mutandis*, to awards as well as to directions in a will or codicil to execute any particular settlement.⁴ An Injunction may yet in certain cases be granted to restrain an arbitrator from acting and the parties from proceeding before him for an award under the agreement.⁵ With regard to further rules governing the grant of specific performance or Injunction in cases of contract *v. post* § 60.

Where an agreement is of an affirmative character the remedy, in a proper case, lies in specific performance; and an Injunction may also be granted both for the enforcement of negative terms, if any, and also in aid of and ancillary to the relief sought by way of specific performance of the contract.⁶ If, however, an agreement though of an affirmative character is such that the Court would not under the rules abovementioned specifically enforce it, no Injunction will be issued to prevent the breach

(b) No Injunction will be granted in respect of the breach of such contracts.

¹ *Ib.*, ss. 525, 526.

² Collett, Specific Relief Act, 118.

³ See *Raghubar Dial v. Madan Mohan Lal*, 1 L. R., 16 All., 3 (1893).

⁴ Fry, *op. cit.*, Ch. viii.

⁵ *Wood v. Griffith*, 1 Sw., 54, *per* Lord Eldon.

⁶ Act I of 1877, s. 30; see Fry, *op. cit.*, s. 1593; as to settlements *v. post*.

⁷ See Kerr, *Inj.*, 600.

⁸ *v. post*, p. 247.

⁹ *v. post*, p. 247.

thereof.¹ In such a case the contract is *ex-hypothesi* one the breach of which will be properly relieved by the grant of damages, and no Injunction will issue where the remedy by compensation is both proper and available. Moreover, to issue an Injunction might be tantamount to specifically enforcing in fact an agreement which was not so enforceable. It is obvious also that no Injunction can issue in aid of or ancillary to specific performance, where the latter relief cannot be granted.

(c) Except in certain cases of negative agreements coupled with affirmative agreements not specifically enforceable.

Notwithstanding the general rule that an Injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced, where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, will not preclude it from granting an Injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.² As to these exceptional cases *v. post*, p. 252.

(iv) The operation of the law relating to the registration of documents must not be affected.

Except where it is otherwise enacted nothing in the Specific Relief Act shall be deemed to affect the operation of the Indian Registration Act (III of 1877) on documents.³ That Act declares the registration of certain documents to be compulsory such as instruments⁴ of gift of immoveable property; certain other non-testamentary instruments dealing with immoveable property; leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent; and authorities to adopt a son not conferred

¹ Act I of 1877, s. 56, cl. (f).

² Act I of 1877, s. 57.

³ Act I of 1877, s. 4, cl. (c).

⁴ As to the meaning of the term

"instrument" see *Somu Gurukkal v. Rangammal*, 7 Mad. H. C. R., 13 (1871).

by will.¹ It further declares that no document which is required to be registered shall affect any immoveable property comprised therein, or confer any power to adopt or be received as evidence of any transaction affecting such property,² or conferring such power, unless it has been registered in accordance with the provisions of this Act.³ The words "or be received as evidence of any transaction affecting such property" mean "or be received as evidence of any transaction so far as it affects such property."⁴ An unregistered document, the registration of which is compulsory, is admissible in evidence for a collateral purpose. So an unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security may be used in evidence to enforce the personal obligation.⁵ The effect of the abovementioned words therefore is that documents, the registration of which is compulsory, although inadmissible, unless registered, as evidence of any transaction affecting immoveable property or conferring a power to adopt will yet be admissible for other purposes.⁶ By the terms of section 3, Act

¹ Act III of 1877, s. 17; the registration of certain other documents is optional; *ib.*, s. 18.

² It may, however, be used in evidence in support of a claim for moveable property; *Thandavan v. Valliamma*, I. L. R., 15 Mad., 336 (1892); but see also *Lakshamma v. Kameswara*, I. L. R., 13 Mad., 281 (1889).

³ Act III of 1877, s. 49.

⁴ *Ulfatunnissa Elahijan Bibi v. Hosain Khan*, I. L. R., 9 Cal., 520, 525, F. B. (1882); 12 C. L. R., 209; and see *The Bengal Banking Corporation v. S. A. Mackertich*, I. L. R., 10 Cal., 315, 322 (1883); *Thandavan v. Villiamma*, I. L. R., 15

Mad., 336, 340 (1892).

⁵ *Ulfatunnissa Elahijan Bibi v. Hosain Khan*, *supra*; see cases there collected and in *Field, Ev.*, 451-453; see last note and *Gomaji v. Subbarayappa*, I. L. R., 15 Mad., 253 (1891); *Madras Deposit and Benefit Society, Ltd. v. Oonnammalai Ammal*, I. L. R., 18 Mad., 29 (1894). So also though an agreement may not be admissible in evidence as creating an interest in land, still it may be used for the purpose of obtaining specific performance; *Adakkalam v. Theethan*, I. L. R., 12 Mad., 505 (1888); *Nagappa v. Devu*, I. L. R., 14 Mad., 55 (1890).

⁶ *Field, Ev.*, 451, 452.

III of 1885, section 54, paragraphs 2 and 3, sections 59, 107 and 123 of the Transfer of Property Act (IV of 1882) are to be read as supplemental to the Indian Registration Act. The Transfer of Property Act requires the registration of certain sales,¹ mortgages,² leases,³ and gifts.⁴ Further a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.⁵ The effect of the combined Acts is that the registration of deeds of sale or of mortgage of immoveable property of the value of Rs. 100 and upwards, of leases year by year, or for a term exceeding a year, and of deeds of gift of immoveable property of any value, is compulsory. Deeds of sale or mortgage of immoveable property of less than Rs. 100 in value, and deeds of gift of moveable property, must also be registered, unless there is delivery of possession, when the transfer is effected without a deed. In the case of a simple mortgage, there can be no delivery of possession; so all such deeds must be registered.⁶

Documents which require registration under the compulsory provisions of the Registration Acts are (except for collateral purposes) inadmissible in evidence when not registered.⁷ Documents which do *not* require registration under those provisions are admissible in evidence, for all purposes, even though not registered.⁸ Section 17 of the Registration Act (III of 1877) should not be construed as requiring a document to be registered which would not have required registration when it was executed. So an

¹ Act IV of 1882, s. 54, §§ 2, 3.

² *Ib.*, s. 59.

³ *Ib.*, s. 107.

⁴ *Ib.*, s. 123.

⁵ *Ib.*, s. 118.

⁶ Field. Ev., 446, 447.

⁷ Act III of 1877, s. 49; *v. ante*;
and as to documents which have

been held to require registration, see cases collected in Field, Ev., 447, 448; *Gurunath Shrinivas Desai v. Chenbasappa*, I. L. R., 18 Bom., 745 (1893).

⁸ See cases collected in Field, Ev., 448, 449.

instrument which did not require registration under Act XX of 1866 is not inadmissible in evidence by reason of Act III of 1877.¹ As an unregistered document which requires registration is inadmissible as evidence of any transaction affecting immoveable property or conferring a power to adopt² oral or other secondary evidence of the transaction embodied in the document will be excluded by sections 91 and 65 of the Indian Evidence Act. The result is that transactions committed to writing if not registered when registration is necessary, are *incapable of proof and wholly inoperative*, as indeed was held to be the result of the Registration Act even before the Evidence Act came into operation.³ "Where a party comes into Court resting his claim on a written title which the law requires to be registered, he cannot when he has failed to register, and is in consequence, unable to use his title-deed, turn round and say I can prove my title by secondary evidence. It would be useless to have a compulsory Registration Act, if such a course were open to suitors."⁴ Where the instrument inadmissible for want of registration was a

¹ *Desai Motilal Mangalji v. Desai Parashottam Nandalal*, I. L. R., 18 Bom., 92 (1893); *Ram Coomar Singh v. Kishari*, I. L. R., 9 Cal., 68 (1882); but see also *Lachman Das v. Dipchand*, I. L. R., 2 All., 851 (1880); *Jethabai Dayalji v. Girdhar*, I. L. R., 20 Bom., 158 (1894); *Gangaram Ghose Sirdar v. Kalipodo Ghose*, I. L. R., 11 Cal., 661 (1885).

² Act III of 1877, s. 49.

³ *Field, Ev.*, 440, 450; *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*, 1 B. L. R., F. B., 58 (1868); 10 W. R., F. B., 51; *Monmohinee Dossee v. Bishen Moyee Dossee*, 7 W. R., 112 (1867); *Sonu Gurrukul v. Rangammal*, 7 Mad. H. C. R., 13 (1871), [admissions by defendant]; *Mussamut Kaboolun v.*

Shumsheir Ali, 11 W. R., 16 (1869); *Dinanath Mookerjee v. Debnath Mullick*, 5 B. L., R. App. 1. (1870); 13 W. R., 307; *Sheikh Ibrahim v. Parvata*, 8 Bom. H. C., A. C. J., 163 (1871); *Crowdie v. Kullar Chowdhry*, 21 W. R., 307 (1874); *Shaikh Mahomed Ohid v. Kalee Pershad Singh*, 24 W. R., 320 (1875); *Ram Chunder Halder v. Gobind Chunder Sen*, 1 C. L. R., 542 (1878); *Divethi Varada Ayyangar v. Krishnasami Ayyangar*, I. L. R., 6 Mad., 117 (1882).

⁴ *Monmohinee Dossee v. Bishen Moyee Dossee*, 7 W. R., 112 (1867), cited and approved in *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*, 1 B. L. R., F. B., 58, 79 (1868); 10 W. R., F. B., 51.

receipt, oral evidence of the payment of the money was admitted on the principle embodied in illustration (e) to section 91 of the Indian Evidence Act.¹ Secondary evidence may be admissible in the case of a document which is unregistered through no fault of the plaintiff.² In the undermentioned case the defendant's title-deed was inadmissible in evidence as it was not registered; but it was *held* that though the defendant could not prove a title by purchase, it was open to him to establish his title without the aid of the deed of sale; that his possession of the premises in question for more than twelve years prior to the institution of the suit was adverse to the predecessors of the plaintiff whose claim, as assignee of their interests, was consequently barred.³ Where the defendants purchased land from the plaintiff, and gave bonds for the purchase-money and these bonds were not registered and were, therefore, not admissible in evidence; it was *held*, that the plaintiff, as vendor, was under no necessity to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money.⁴ When the fact is *admitted*, to prove which it would be necessary to use in evidence a document which has not been registered, although registration thereof is by law compulsory, the non-registration cannot affect the decision of the case. The question of registration becomes material only when it is sought to use the document in evidence.⁵ So where the

¹ *Soorjoo Coomar Bhattacharjee v. Bhugwan Chunder Roy*, 24 W. R., 328 (1875); *Dalip Singh v. Durgas Prasad*, I. L. R., 1 All., 442 (1877); *Waman Ramchandra v. Dhondiba Krishnaji*, I. L. R., 4 Bom., 126 (1879); *Venkayyar v. Venkatasubbayyar*, I. L. R., 3 Mad., 53 (1881).

² *Nymakka Routhen v. Varana*

Mahomed Naina Routhen, 5 Mad. H. C. R., 123 (1869); *Nagappa v. Devi*, I. L. R., 14 Mad., 55 (1890).

³ *Sambhubbai Karsandas v. Shirlaldas Sadasivadas Desai*, I. L. R., 4 Bom., 89 (1879).

⁴ *Virchand Lalchand v. Kumaji*, I. L. R., 18 Bom., 48 (1892).

⁵ *Syed Reza Ali v. Bhikun Khan*, 7 W. R., 334 (1867).

existence of the agreement was not disputed and its production was not necessary, it was held that the plaintiff was entitled to whatever relief the effect of the plaint and written statements taken together would entitle him on the admission of the defendant.¹ It has, however, been said to be doubtful whether, if the document itself is tendered in evidence, any admission of its execution could make up for the want of registration; that there is a difference between admitting the fact, to prove which the document is sought to be used, and admitting the document itself when offered as evidence and rejected for want of registration. Where, in consequence of the admission, it becomes unnecessary to use the document at all, the fact of non-registration may be immaterial; but the case is different when the existence of the document is disclosed and the document itself produced.² The provisions of the Registration Act, however, will not be permitted to be used to subserve fraud.³

The effect of the Specific Relief Act therefore is to render registration a *sine qua non* to the validity of certain documents, and the object of section 4, clause (c) of the Specific Relief Act, would appear to be to prevent any specific relief being given either by specific performance, Injunction or otherwise, the effect of which would be to weaken or nullify the provisions of the former Act as also to enjoin that a specific rule of the statute law prescribing formalities in respect of the execution of documents shall not, as was done by the Court of Chancery in the case of the

¹ *Chedambaram Chetty v. Karunayavalangapully Taver*, 3 Mad. H. C. R., 342 (1867); *Hudleston v. Briscoe*, 11 Ves., 583—596; and see *Sheikh Ibrahim v. Parvata*, 8 Bom. H. C. R., A. C. J., 163 (1871).

² Field, Ev., 453, 454.

³ See cases cited, *ib.*, 459; and see generally as to the Registration Act and cases thereunder; Field, Ev., 443—459; Rivaz, Indian Registration Act, 4th Ed. (1894). See Ameer Ali and Woodroffe's Indian Evidence Act, 3rd Ed., pp. 1244—1247.

Statute of Frauds, be evaded under the cover of some opposing equity which was claimed however to be either subservient to the true objects of the statute, or collateral to it and independent of it. These exceptions to the statute have been held to lead to embarrassments in the actual administration of equity in England; and although in some cases no great mischief can occur from enforcing them, yet in others, difficulties may be stated in their practical application which have the effect of questioning their original propriety.¹ But though the Courts in England have granted equitable relief in cases falling within the purview of the statute and the Courts of this country are prohibited from affecting by their orders the operation of the Registration Act, it is of course none the less necessary to clearly ascertain whether or not the relief which it is proposed to give will in fact affect such operation. Therefore though a document which purports to create an interest in land requires registration,² and if it be not registered will not be available as affecting the property comprised therein³ yet such a document though inadmissible in evidence as *creating an interest in land* may be used for the purpose of obtaining a specific performance of the agreement evidenced by it.⁴ In such a case the operation of the Registration Act is not affected because it has been held that that Act does not itself operate to exclude unregistered documents except when tendered as affecting that which the Act says

¹ Collett, *op. cit.*, 68; Nelson, *op. cit.*, 79, 114, 115; Story's Eq. Jur., §§ 752—769.

² Act III of 1877, s. 17, cl. (b).

³ *Ib.*, s. 49.

⁴ *The Bengal Banking Corporation v. S. A. Mackertich*, I. L. R., 10 Cal., 315 (1883); *Addakkalam v. Theethan*, I. L. R., 12 Mad., 505 (1888); *Nagappa v. Devu*, I. L. R.,

14 Mad., 55 (1890); *Chunilal Pan-nalal v. Bomanji Mancheri Modi*, I. L. R., 7 Bom., 310 (1883); *Shri-dhar Ballal Kelkar v. Chintaman Sadashiv Mehendale*, I. L. R., 18 Bom., 396 (1893); See *Purmanan-das Jewanias v. Dharsey Virji*, I. L. R., 10 Bom., 101 (1885); *Hormas-ji Manekji Dadachanji v. Keshav Puresholam*, I. L. R., 18 Bom., 13 (1893).

they shall not effect, *viz.*, a conveyance as distinct from a contract to convey. They will not operate to transfer ownership and cannot be received in evidence to show that the ownership has passed from one person to another, and in so far as they are used for this purpose specific relief will in respect of them be refused.

§ 56. Covenants are either of an affirmative or negative nature. Negative covenants may be either express or implied. A contract or conveyance may comprise covenants of both kinds, that is an affirmative covenant and a negative covenant whether express or implied. The ordinary remedy by way of damages is available for the breach of covenants whether affirmative or negative in form. The remedy by way of specific relief however differs, for affirmative covenants are enforced by specific performance and negative covenants by Injunction.

Varieties of
Covenants.

When a person covenants that something has been done or shall be done hereafter the covenant is said to be affirmative. In cases where the covenant is affirmative specific relief is given by way of specific performance,¹ that is, by ordering a party to do the very act which he is under an obligation to do.² The question whether an affirmative covenant is or is not the subject of specific performance is determined by the rules contained in Chapter II of the Specific Relief Act. If under those rules a Court would not specifically enforce a contract, it cannot grant an Injunction to prevent the breach of such contract.³

(i) Affirmative.

Where a man covenants that a thing has not been done or shall not be done hereafter, the covenant is a negative one. In cases where the covenant is negative, specific relief is given by way of Injunction.⁴ A negative

(ii) Negative. ✓

¹ Kerr, *Inj.*, 439.

² Act I of 1877, s. 5 (b).
Ib., s. 56 (f).

⁴ Kerr, *Inj.*, 439; *see ib.*, 439—454, for instances illustrating the issue of Injunctions in the case of negative covenants.

agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void; saving of agreements not to carry on a business of which the good will is sold and such agreements between partners prior to dissolution or during the continuance of the partnership. Save therefore in the case of the excepted agreements¹ no Injunction can issue. It is clear that the restriction aimed at by the Act is not an absolute one only and that an agreement may still be void though it only affects to create a partial restriction.² The Indian Contract Act does away with the distinction between total and partial restraint of trade and makes all contracts falling within the terms of the section,³ void unless they also fall within the terms of the exceptions to that section which was intended to prevent a partial as well as a total restraint of trade.⁴ A stipulation however in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract is not a stipulation in restraint of trade.⁵ In the undermentioned case⁶ an Injunction was granted

¹ See Act I of 1877, s. 57, Illustrs. (a) (b), (c).

² *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76, 85, 86 (1874); 22 W. R., 370; *Nur Ali Dubash v. Abdul Ali*, I. L. R., 19 Cal., 765 (1892); *The Brahmaputra Tea Co., Ltd. v. Scarth*, I. L. R., 11 Cal., 545 (1885).

³ Sales of secret processes are not within the principle or the mischief of restraint of trade at all; *Leather Cloth Co. v. Lonsont*, 9 Eq., 345; *Mathews, op. cit.*, 26, 27, 91, 92, 121, 129, 130, 209, 229; *Maxim Nordenfellt Guns and Ammunition Company v. Nordenfellt*, 1893, 1 Ch., 630. An agreement of service by which a person binds himself during the term of his agreement not to compete with his employer is not, it seems, within the

terms of the section: *The Brahmaputra Tea Co., Ltd. v. Scarth*, I. L. R., 11 Cal., 545, 550 (1885); *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 708 (1894). As to contracts restraining the liberty of sale of goods, *v. post*.

⁴ *Nur Ali Dubash v. Abdul Ali*, I. L. R., 19 Cal., 765 (1892); *MacKenzie v. Striramiah*, I. L. R., 13 Mad., 472 (1890); *The Brahmaputra Tea Co., Ltd. v. Scarth*, I. L. R., 11 Cal., 545 (1885).

⁵ *Carlisle Nephews & Co. v. Ricknauth Bucktearmull*, I. L. R., 8 Cal., 809 (1882); see *Sadagopa Ramanjiah v. Mackenzie*, I. L. R., 15 Mad., 79 (1891).

⁶ *Charlesworth v. Macdonald*, I. L. R., 23 Bom., 103 (1898).

restraining a party from practising as a doctor in Zanzibar on his own account during the period of three years for which he had agreed to become an assistant of another. Where a person having a license for the manufacture of salt entered into a contract with a firm of merchants whereby it was provided that he should not manufacture salt in excess of the quantity which the firm, at the commencement of each manufacturing season, should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price, and the agreement was to be in force for a period of five years; it was *held*, in a suit by the merchants for an Injunction restraining the licensee from selling his salt to others and for damages, that whether or not the first of these clauses was invalid under section 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.¹ A contract under which goods are purchased at a certain rate for a certain market, containing a stipulation that if the goods go to another place a higher rate should be paid for them, is not one in restraint of trade.²

Every agreement in restraint of the marriage of any person other than a minor being void;³ as also saving certain exceptions, every agreement in restraint of legal proceedings,⁴ it follows that no Injunction can be granted in respect of the breach of such agreements.

Though affirmative covenants are enforceable by specific performance yet contracts and covenants, though affirmative in form, may often involve a negative in substance. When the importation of a negative quality into

¹ *Sadagopz Ramzanjiah v. Mackenzie*, I. L. R., 15 Mad., 79 (1891);

S. C. in Lower Court, I. L. R., 13 Mad., 472 (1890).

L. R., 17 Cal., 320 (1890).

² Act IX of 1872, s. 26,

⁴ *Ib.*, s. 28, which saves certain contracts to refer to arbitration.

³ *Prem Sook v. Dhurum Chand*, I.

an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts which are inconsistent with the agreement.¹ But if an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an Injunction is in effect and spirit an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the plaintiff to his remedy by damages.²

(iii) Affirmative coupled with negative.

An agreement may contain both affirmative and negative covenants, the latter of which may be either express or implied. Where the affirmative covenants is capable of specific performance it may be so enforced and the negative covenant may be enforced by an Injunction. Where however the affirmative covenant is not capable of specific performance, it was formerly a matter for doubt whether the Court would enforce by Injunction the negative part of an agreement containing both affirmative and negative stipulations, unless the affirmative part of the agreement was of such a nature that it would be specifically enforced by decree.³

The general rule is that where specific performance will not be granted an Injunction will not be issued; and that specific performance in part is impossible, for, as a general rule, equity will not enforce *part* of a contract unless the whole can be performed.⁴ It would follow strictly therefore that the Court should refuse to interfere by Injunction to restrain the breach or non-performance of part of an executory contract where the rest of the contract is

¹ Kerr, *Inj.*, 462—466, *et ibi casus* [see *Nusserwanji Mericanji Panday v. Gordon*, 1. L. R., 6 Bom., 266, 280 (1881); *Callianji Harjivan v. Narsi Tricum*, 1. L. R., 18 Bom.,

712, 713 (1894)].

² *Ib.*, 466—468, *et ibi casus*.

³ See Kerr, *Inj.*, 470.

⁴ Fry, *S. P.*, § 821; see Act I of 1877, s. 17.

incapable of, or is not a proper subject for, specific performance, since the grant of an Injunction in such a case would be tantamount to a merely partial enforcement of the contract.¹ And so it was formerly held that where the positive part of an executory contract could not be performed by the Court, it would not enforce the negative part by an Injunction.² But now specific performance in part will be decreed if the contract be one which is divisible. When a part of a contract which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part,³ for owing to the divisibility of the whole contract, the parts in question are really independent contracts. By analogy therefore to this rule of specific performance and notwithstanding the rule of Injunction which prohibits relief in the case of a breach of contract, the performance of which would not be specifically enforced,⁴ when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement does not preclude it from granting an Injunction to perform the negative agreement: Provided that the applicant has not failed to perform the contract so far as it is binding upon him.⁵ In the leading case of *Lumley v. Wagner*⁶

¹ Fry, S. P., §§ 1150, 1151.

² *Ib.*, § 852.

³ Act I of 1877, s. 16; Fry, S. P., § 821.

⁴ Act I of 1877, s. 56, cl. (f).

⁵ Act I of 1877, s. 57; *Lumley v. Wagner*, 1 DeG. M. & G., 604. In

Subba Naidu v. Haji Badsha Sahib, I. L. R., 26 Mad., 168, 173 (1902), it was held that there had been no such failure.

⁶ DeG. M. & G., 604 (1852); *Illus.* (c) to s. 57 of the Specific Relief Act is taken from this case.

there was an express negative covenant coupled with the affirmative covenant. There the defendant agreed with the plaintiff that she would sing at the latter's theatre during a certain period of time and would not sing elsewhere without the plaintiff's written authority; and the Court interfered to prevent the violation of the negative stipulation although it could not enforce the specific performance of the entire contract. But the principle of this case has not been confined to cases of express negative stipulations, but has been applied to cases where the negative agreement is only implied¹ which cases are also included within the terms of section 57 of the Specific Relief Act.² The doctrine has been criticised in England, and it has been stated to be doubtful whether the presence of a negative stipulation can be relied on, if the contract is not such in its nature as to be the proper subject of the equitable jurisdiction.³ That, however, the Courts in India have jurisdiction in the case of express negative stipulations, is clear from the terms of the section. Again it has been observed⁴ that it is not easy to see the limits to which the doctrine of an implied negative might be carried. Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. But it does not at all follow that because a person has agreed to do a particular thing, he is therefore to be

¹ Fry on Specific Performance, § 854; *Webster v. Dillon*, 3 Jur., N. S., 482; *Montague v. Flockton*, L. R., 16 Eq., 189 [two cases of doubtful authority,] see *Whitwood Chemical Co. v. Hardman*, 1891, 2 Ch., 416; *De Mattos v. Gibson*, 4 DeG. & J., 276; *Sevin v. Deslandes*, 30 L. J. Ch., 457.

² See s. 57, Illus. (d); *Callianji*

Harjivan v. Narsi Tricum, I. L. R., 18 Bom., 708, 709 (1894); S. C. in appeal, I. L. R., 19 Bom., 764 (1895).

³ Fry, *op. cit.*, § 860, citing observations of Lord Selborne in *Wolverhampton and Walsall Railway Co. v. London and North-Western Railway Co.*, L. R., 16 Eq., 440.

⁴ Fry, *op. cit.*, § 857.

restrained from doing everything else which is inconsistent with it.¹ If there is a distinct negative contract in the agreement the Court may fasten upon that and separating that from the rest of the agreement may enforce specific performance of that contract. But when a plaintiff comes into Court upon an agreement which does not contain any such direct negative clause, and when one must infer the negative from the necessity of the case the instances in which the Court has found it possible to act are very few and special.² The principle, no doubt, does not depend upon whether there is an actual negative clause; but, for the grant of an Injunction, the Court must be able to say that the parties were contracting in the sense that one should not do this or the other—some specific thing upon which one can put one's finger.³ In such cases as these there is no very definite line, and the case of *Lumley v. Wagner* is an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend.⁴ The present tendency in England thus seems to be not to extend the principle of *Lumley v. Wagner* and to limit the doctrine in the leading case (1) to contracts of such a nature as are the proper subjects of equitable jurisdiction,⁵ and (2) in regard to implied negative terms, to

¹ *Whitwood Chemical Co. v. Hardman*, L. R., 1891, 2 Ch., 426, 427, per Lindley, L. J., cited in *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 709 (1894).

² *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 713 (1894), citing *Pelo v. Brighton and Uckfield, &c., Railway Co.*, 1 H. & M., 486.

³ *Whitwood Chemical Co. v. Hardman*, supra, per Lindley, L. J. [See "*Star*" *Newspaper Co., Ltd. v. O'Connor*, W. N. (1893), 114, where Kekewich, J., referring to

this passage and stating the law to be settled by the former case said: "Putting that aside (the observation of Lindley, C.J.) the judgment of the Court of appeal must go to this—that in order to grant an Injunction in aid of a contract of service you must find an express negative purpose."]

⁴ *Ib.*, cited in *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 709, 710 (1894).

⁵ *i.e.*, contracts which would fall within s. 12 of the Specific Relief Act.

refuse to raise such terms by implication except in the cases where the Courts have already done so.¹ Though the Courts in India have an undoubted jurisdiction to grant an Injunction either in the case of express or implied² negative covenants coupled with affirmative covenants incapable of specific performance, yet it is apprehended that as the grant of an Injunction is in all cases a matter of discretion, the Courts in this country will, in the exercise of their discretionary jurisdiction be guided by the current tendency of English judicial opinion upon this subject.³

The general principle that in granting an Injunction the Court must exercise its discretion with a view to all the circumstances of the case particularly holds good in the special case where specific performance is indirectly sought by the enforcement of an implied negative covenant. Even in *Lumley v. Wagner*⁴ where there was held to be a direct negative covenant, the plaintiff was only held to be entitled to the benefit of this principle of law, because looking at the merits and the circumstances of the case he was right.⁵

Cases, however, have occurred and will occur where the circumstances of the case require the importation of a negative quality. Thus the contract of charter-party is from the peculiar nature of the subject of the contract,

¹ Fry, *op. cit.*, §§ 862, 857—861; Nelson's Specific Relief Act, 301.

² See Act I of 1877, s. 57, Illustrations (b) and d), and *Madras Railway Co. v. Rust*, I. L. R., 14 Mad., 18 (1890).

³ Nelson, *op. cit.*, 301, 145; *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 709, 711, 713, 714 (1897) S. C. in appeal, I. L. R., 19 Bom., 764 (1895); as to the discretion to be exercised where a negati-

ve quality is imported; see *Dohert v. Allman*, 3 App. Cas., 709, cited in *Callianji Harjivan v. Narsi Tricum* supra, at pp. 712, 713; as to mutuality being unnecessary, see *Nusserwanji Mervanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 280, 281 (1881).

⁴ 1 DeG. M. & G., at p. 633.

⁵ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702, 704 (1894).

an exception to the general rule that a negative quality will not be imported into an affirmative agreement unless the agreement is of such a nature that a decree for specific performance can be made; and the owner of a vessel will be restrained from doing any act inconsistent with the charter-party.¹ But though where a charter-party has been actually completed, the Court will, by Injunction, prevent an employment of the ship inconsistent with its terms, where there is only an agreement for a charter-party, no such Injunction will be granted.² In the case last cited, West, J., said: "As to the merits section 57 of the Specific Relief Act speaks of the Court being 'unable' to compel specific performance. The particular ground of inability is immaterial, and may be anything which constitutes a bar to specific performance under the provisions of Chapter II of the Specific Relief Act. In the illustrations to the section the bar to specific performance in each case is to be found in section 21, clause (b) of Chapter II, but if an Injunction may be given in the case of a contract, specific performance of which is forbidden under section 21, clause (b), it is plain that (unless section 57 is to be made a nullity), it can also be given in the case of a contract, specific performance of which is forbidden under section 21, clause (g), or under the combined clauses, or under any other section of Chapter II."³

The first case was referred to in a subsequent decision. In this case plaintiffs advanced money to the defendants

*Subba Naidu
v. Haji Badsha
Shahib.*

¹ *DeMattos v. Gibson*, 4 D. & J. 276; *Sevin v. Deslandes*, 30 L. J. Ch., 467; Kerr, Inj., 468, 473, 605.

² *Haji Abdul Allarakhi v. Haji Abdul Bacha*, I. L. R., 6 Bom., 5 (1881); in this case the application was for an interim injunction which was refused, but a rule nisi was

granted. It does not appear whether this rule was ever heard.

³ *Madras Railway Company v. Rust*, I. L. R., 14 Mad., 18, 22 (1890); *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., 702, 711 (1894).

⁴ *Subba Naidu v. Haji Badsha Shahib*, I. L. R., 26 Mad., 168 (1902).

for the purpose of carrying on work in certain mica mines in pursuance of an agreement by which defendants undertook, in consideration of the advance, to send all the mica produced from the mines to plaintiffs and bound themselves not to send any of it to any firm other than plaintiff's, or keep any in stock. Plaintiffs now complained that defendants had in breach of their agreement, arranged to consign and had already made consignments of mica to another firm and were keeping mica in stock. Plaintiffs filed this suit for specific performance and for an Injunction restraining defendants from acting in violation of the terms of the agreement. A temporary Injunction was subsequently applied for and obtained. Upon an appeal being preferred by defendants against the order granting the temporary Injunction: *Held*, that the Injunction was rightly granted. The defendants' contention was that inasmuch as the positive covenant could not be enforced by a decree for specific performance a breach of the negative covenant ought not to be restrained by an Injunction. As to this the Court observed as follows:—"Now, we are relieved from considering the question as to whether the positive covenant in this case can or cannot be specifically enforced because it is conceded by the counsel on behalf of the plaintiffs that it cannot. In this state of things, therefore, it has to be considered whether, under the law of this country, a breach of the negative covenant not to consign to third parties can be restrained by Injunction. The law with regard to the granting of permanent Injunctions is regulated by the provisions of the Specific Relief Act. Section 56 says an Injunction cannot be granted in certain specified cases, including an Injunction to prevent the breach of a contract, the performance of which would not be specifically enforced. That is clause (f) of section 56.

Section 57 says "Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an Injunction to perform the negative agreement, provided the applicant has not failed to perform the contract so far as it is binding on him."

Then, section 54, which is the first section of Chapter X which deals with perpetual Injunctions, is as follows :— "Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual Injunction may be granted to prevent the breach of an obligation existing in favour of the applicant whether expressly or by implication. When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act."

Now, some of the rules and provisions are to be found in section 21, which speaks of contracts which cannot be specifically enforced, and one of the contracts which under that section cannot be specifically enforced, is referred to in paragraph (b)—"a contract which runs into such minute or numerous details, or which is dependent on the personal qualifications or volition of the parties, or otherwise from its nature, is such that the Court cannot enforce specific performance, of its material terms," and Mr. Grant's proposition of law is that section 57 only applies to the case of contracts which are specified in section 21, clause (b). In other words, he says that section 57 only applies to cases which I may describe compendiously as cases like *Lumley v. Wagner*. There is certainly nothing in the words of section 57 to suggest that so narrow a construction should be placed

upon it. The section is really a proviso to section 56, which cuts down the operation of the preceding section. Mr. Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his proposition. The authorities such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Company v. Rust*¹ are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, 'It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then, by virtue of section 54, clause (2), an Injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (g) of specific performance cannot be the subject of an Injunction. It seems to me that this argument would make section 57 of the Act a nullity.' In that case Mr. Grant appeared as Counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards *Charlesworth v. Macdonald*,² I do not think it can be said to afford us any assistance, because the question in that case arose in Zanzibar, where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as

¹ I. L. R., 14 Mad., 18.

² I. L. R., 23 Bom., 103.

cases like *Lumley v. Wagner*,¹ it has to be observed that one of the illustrations to section 57, viz., illustration (c) is a re-production of the decision in *Lumley v. Wagner*. But that is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley v. Wagner*. That, I should have thought, was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (b). If the Legislature intended that section 21 should apply nothing would have been easier than to have said so. It seems to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have arisen in the English Courts with regard to cases of this character—difficulties which resulted in the English authorities being somewhat confused and not altogether reconcilable.”

Though section 57 includes the words ‘notwithstanding section 56, clause (f),’ (that is, ‘an Injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced’), still the discretion of the Court, which must always be exercised before granting an Injunction (section 52), must be the discretion set forth in section 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that section 56, clause (f), speaks of contracts, the performance of which *would not* be specifically enforced, but section 57 says that ‘the circumstances that the Court is *unable* to compel specific performance of the affirmative agreement, &c.’ This apparently relates to section 21, which treats

¹ 1 D. M. G., 604.

of contracts which 'cannot be specifically enforced. Section 57 can hardly mean that though the Court would not in the proper exercise of its discretion (as explained in section 22) decree specific performance of a contract, though it would be lawful to do so (as explained in section 21), yet when indirectly decreeing specific performance by granting an Injunction under section 57, and exercising its discretion as provided by section 52, the Court must not be guided by the rules laid down in section 22 as to the exercise of its discretion.'"¹

The section it seems contemplates two distinct agreements whether one of such agreements be express or implied. The negative part of an agreement will not be enforced, unless it constitutes a distinct, separate, and substantive part of the contract. If the negative part is merely subsidiary or incidental to the affirmative part, or if the affirmative and negative stipulations are merely correlative to and not capable of being separated from each other the Court will not enforce the negative part by Injunction, unless the affirmative part is of such a nature that it can be specifically enforced.² The negative agreement may be express or implied. The Court will, where parts of the agreement are distinct and separable from the rest, import a negative and interfere by way of Injunction.³

The Court will neither enforce an express negative term nor will it import a negative and enforce by Injunction, unless the person who makes the application has actually performed his own part of the agreement.⁴ The mere assertion on his part that it is his intention to perform

¹ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 18 Bom., at p. 715, per Candy, J.

² Kerr, Inj., 471.

³ *Ib.*, 468.

⁴ Act I of 1877, s. 57; Kerr, Inj., 469, 473; Fry on Specific Performance, § 1152.

his part of the agreement is not sufficient, unless the Court can decree specific performance against him.¹

§ 57. The appropriate remedy by way of specific relief in the case of affirmative covenants lies in the specific performance which consists in ordering a party to do the very act which he is under an obligation to do. The rules relating to the grant of this form of relief are contained in Chapter II of the Specific Relief Act. It would be beyond the scope of the present work to deal at length with the subject of specific performance which is only here touched upon, in so far as the principles which govern the grant of specific performance have under s. 54 of the Specific Relief Act to be considered where Injunctions are issued to prevent the breach of obligations arising in contract. The jurisdiction of the Court in Injunction is connected with the specific performance of executory contracts in three ways:—(1) sometimes the Injunction is the instrument by which the Court specifically enforces the contract itself or some part of it (as in the case of express or implied negative agreements, whether standing alone or in connection with affirmative agreements); (2) sometimes the Injunction is merely incidental or ancillary to the performance of the contract; and (3) sometimes the Injunction is used for the purpose of giving effect to rights resulting from the non-performance of the contract.²

§ 58. The second of the above cases exists when the Injunction is used in aid of an ancillary to the primary relief by specific performance. The jurisdiction of the Court in Injunction is often ancillary to that in specific performance, for the purpose of preventing the defendant

Specific performance of affirmative agreements.

Injunctions in aid of and ancillary to specific performance.

¹ *Peto v. Brighton, Uckfield and Tunbridge Wells Railway Co.*, 1 H. & M., 488.

² *Fry on Specific Performance*, § 1146. See further as to the third case, *ib.*, §§ 1165—1167.

making use of some legal interest or right vested in him in a way inconsistent with the equity claimed by the plaintiff, or embarrassing the plaintiff by dealing with the property during the pendency of the action, or obstructing the performance of some act incidental to the execution of the contract. In the class of cases now referred to, the Injunction is granted upon interlocutory application and until the trial on the plaintiff showing a *prima facie* case for specific performance.¹ The right to have an Injunction depends on the nature of the remedy which a Civil Court would give in the suit, and, if it be shown that a decree for specific performance would necessarily follow proof of the facts alleged, an Injunction may properly be granted, as without it the suit may, and in many cases probably would, be infructuous.² Thus interlocutory Injunctions have been granted during the pendency of a suit, for specific performance restraining the bringing of an ejectment during the suit, and restraining the conveying away of the legal estate, or the sale or surrender of the estate, and restraining a purchaser, who had got into possession, from cutting timber on the estate. So as a general principle, if there is a clear valid contract for sale, the Court will not permit the vendor afterwards to transfer the estate to a third person though such third person would be affected by *lis pendens*. A Court of Equity has jurisdiction pending a suit for specific performance to restrain a party from alienating or affecting by other acts the subject-matter of litigation.³ So the Civil Procedure Code provides that an Injunction may be granted, if in any suit it is proved that any property in dispute in a suit is in danger of being

¹ Fry, *op. cit.*, §§ 1154, 1155.

² In the matter of *Gunput Narain Singh*, I. L. R., 1 Cal., 74, 76 (1875).

³ Fry, *op. cit.*, §§ 1156—1158.

⁴ Kerr, *Inj.*, 484—486.

wasted, damaged, or alienated by any party to the suit.¹ The Courts will in general restrain by Injunction any act inconsistent with the due performance of the contract.² In the undermentioned case,³ Jessel, M. R., observed as follows :—"I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause."

§ 59. In the preceding paragraph Injunctions have been considered as incident or ancillary to the primary relief, namely, specific performance. Sometimes, however, the Injunction is itself the instrument of performance, that is, the instrument by which the Court specifically enforces the contract itself or some part of it. So the appropriate remedy in the case of a negative agreement is Injunction, as that for an affirmative agreement is specific performance. It is, however, only the form of the remedy which differs; for whenever the Court grants an Injunction restraining the breach of any express or implied term of a contract it thereby *pro tanto* specifically enforces the performance of the contract. Where the contract contains express negative as well as positive terms, and the positive terms are capable of specific performance by the Court, the latter may and naturally will enforce by Injunction the observance of the negative terms; for by so doing it promotes the complete performance of the contract as a whole. But where part of the contract is of such a nature as to be incapable of specific performance, a difficulty arises with respect to the Court's enforcement of any other part of

Injunctions to restrain the breach of a negative agreement.

¹ Civ. Pro. Code, s. 492.
See Fry, *op. cit.*, §§ 1161, 853.

³ *Smith v. Peters*, L. R., 20 Eq., at p. 513.

it by Injunction, since the Court will not as a general rule, enforce part of an executory contract, unless it can perform the whole. As already mentioned¹ there are, however, cases in which, though the contract as a whole is such as the Court cannot or will not specifically enforce it may nevertheless grant an Injunction restraining the breach of some express or implied term of it.²

In the case of obligations arising in contract the Court will be guided by the rules and provisions relating to specific performance. § 60. The Specific Relief Act enacts (s. 54) that when an obligation arises from contract, the Court in issuing an Injunction must be guided by the rules and provisions contained in Chapter II of that Act relating to specific performance. Those rules and provisions are therefore re-produced in this paragraph.

(i) Cases in which specific performance is enforceable. Except as otherwise provided in Chapter II of the Specific Relief Act, the specific performance of any contract may in the discretion of the Court be enforced—

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust.³

So if *A* holds certain stock in trust for *B*, and *A* wrongfully disposes of the stock, the law creates an obligation on *A* to restore the same quantity of stock to *B* and *B* may enforce specific performance of this obligation.⁴

(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.

So if *A* agrees to buy, and *B* agrees to sell, a picture by a dead painter and two rare China vases; *A* may compel *B* specifically to perform this contract, for there

¹ *v. ante*, § 55.

² Fry, *op. cit.*, §§ 1147, 1148, 1150, 1152; see High, *Inj.*, § 1134.

³ Act I of 1877, s. 12, clause (a) [see Fry, *Specific Performance*, §§ 38, 40 and *post*].

⁴ Act I of 1877, s. 12, *illus.* This

illustration is repealed wherever the Indian Trusts Act, 1882, is in force—see Act II of 1882, ss. 1 and 2, in General Acts 1882, Part I, Ed. 1885, p. 5. The subject is now regulated by that Act where it is in force; see s. 23, Act II of 1882.

is no standard for ascertaining the actual damage which would be caused by its non-performance.¹

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

Unless and until the contrary is proved, the Court will presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer moveable property can be thus relieved.² The jurisdiction to decree specific performance in cases respecting chattels is limited to special circumstances. A breach of contract is usually remediable by a grant of damages. But in cases of contracts respecting land the jurisdiction is in general maintained, for damages for the non-performance of a contract for land, which must be calculated upon the general value of land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value.

The following illustrations are given by the Act of this clause :—

(i) *A* contracts with *B* to sell him a house for Rs. 1,000, *B* is entitled to a decree directing *A* to convey the house to him, he paying the purchase-money.

(ii) In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway-company contract with *Z* to make an archway through their railway to connect lands of *Z* severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a

¹ *Ib.*, clause (b) and illust. thereto. ² Act I of 1877, s. 12, clause (c);
Fry op. cit., §§ 81, 85, 89; *Falke v. Fry op. cit.*, §§ 78, 82, 72.
Gray, 4 *Drew*, 461.

wharf as specified in the contract. *Z* is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money, and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.¹

(iii) *A* contracts to sell, and *B* contracts to buy a certain number of railway-shares of a particular description. *A* refuses to complete the sale. *B* may compel *A* specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a share-holder, which cannot otherwise be procured.²

(iv) *A* contracts with *B* to paint a picture for *B*, who agrees to pay therefor Rs. 1,000. The picture is painted. *B* is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Thus *A* transfers without endorsement, but for valuable consideration, a promissory note to *B*. *A* becomes insolvent, and *C* is appointed his assignee. *B* may compel *C* to endorse the note, for *C* has succeeded to *A*'s liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.³

It will be observed that these clauses of s. 12 of the Specific Relief Act are the same as clauses (a) —(d) of section 54 of the same Act dealing with the issue of Injunctions in cases of tort as to which *v. ante*, pp. 104-112.

¹ *v. ante*, p. 234; *Storer v. Great Western Ry. Co.*, 2 Y. & C. N. R., 18, 53.

v. ante, p. 230, 231; *Duncuft v.*

Albrecht, 12 Sim., 189.

³ Act I of 1877, s. 12, clause (d) & illust.; *Watkins v. Maude*, 2 J. & W., 243.

Notwithstanding anything contained in section 56 of the Indian Contract Act,¹ a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance. (ii) Contracts of which the subject has partially ceased to exist.

The following illustrations exemplify this provision :—

(a) *A* contracts to sell a house to *B* for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase-money.

(b) In consideration of a sum of money payable by *B*, *A* contracts to grant an annuity to *B* for *B*'s life. The day after the contract has been made, *B* is thrown from his horse and killed. *B*'s representative may be compelled to pay the purchase-money.²

This section deals with one species only of impossibility arising subsequent to the formation of the contract, viz., that which arises from the subject-matter of the contract 'ceasing to exist,' and its effect is to suspend the operation of the general rule contained in the Contract Act in this particular instance. It really determines merely the question upon whom the loss of the thing is to fall.³

The Court will not direct the specific performance of a part of a contract except in cases coming under one or (iii) Specific performance of part of contract.

¹ "An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known and

which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." Act IX of 1872 (Contract), s. 56.

² Act I of 1877, s. 13 and Illustrations.

³ Nelson's Specific Relief Act, 127.

upon it. The section is really a proviso to section 56, which cuts down the operation of the preceding section. Mr. Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his proposition. The authorities such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Company v. Rust*¹ are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, 'It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then, by virtue of section 54, clause (2), an Injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (g) of specific performance cannot be the subject of an Injunction. It seems to me that this argument would make section 57 of the Act a nullity.' In that case Mr. Grant appeared as Counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards *Charlesworth v. Macdonald*,² I do not think it can be said to afford us any assistance, because the question in that case arose in Zanzibar, where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as

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cases like *Lumley v. Wagner*,¹ it has to be observed that one of the illustrations to section 57, viz., illustration (c) is a re-production of the decision in *Lumley v. Wagner*. But that is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley v. Wagner*. That, I should have thought, was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (b). If the Legislature intended that section 21 should apply nothing would have been easier than to have said so. It seems to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have arisen in the English Courts with regard to cases of this character—difficulties which resulted in the English authorities being somewhat confused and not altogether reconcilable.’’

Though section 57 includes the words ‘ notwithstanding section 56, clause (f),’ (that is, ‘ an Injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced’), still the discretion of the Court, which must always be exercised before granting an Injunction (section 52), must be the discretion set forth in section 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that section 56, clause (f), speaks of contracts, the performance of which *would not* be specifically enforced, but section 57 says that ‘ the circumstances that the Court is *unable* to compel specific performance of the affirmative agreement, &c.’ This apparently relates to section 21, which treats

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Though section 57 includes the words ‘notwithstanding section 56, clause (f),’ (that is, ‘an Injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced’), still the discretion of the Court, which must always be exercised before granting an Injunction (section 52), must be the discretion set forth in section 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that section 56, clause (f), speaks of contracts, the performance of which *would not* be specifically enforced, but section 57 says that ‘the circumstances that the Court is *unable* to compel specific performance of the affirmative agreement, &c.’ This apparently relates to section 21, which treats

¹ 1 D. M. G., 604.

upon it. The section is really a proviso to section 56, which cuts down the operation of the preceding section. Mr. Grant has been unable to cite any decision of the Courts in this country in support of the proposition which he put forward, though no doubt there are expressions of opinion in the text-books which support his proposition. The authorities such as there are, are against the proposition which he invites us to adopt. Although the facts in *Madras Railway Company v. Rust*¹ are not precisely the same as those in the present case, it supports the view that section 57 means what it says and that it is not to be cut down as Mr. Grant suggests. That decision no doubt was only the decision of a single Judge. With reference to the point the learned Judge says, 'It is argued that when the remedy by specific performance of a contract is expressly refused by Chapter II of the Specific Relief Act, then, by virtue of section 54, clause (2), an Injunction cannot be granted, and therefore that this contract being one extending over more than three years, and therefore not capable by section 21, clause (g) of specific performance cannot be the subject of an Injunction. It seems to me that this argument would make section 57 of the Act a nullity.' In that case Mr. Grant appeared as Counsel and he advanced precisely the same argument which he advanced to-day. In that case the Court declined to adopt his argument and I think rightly. As regards *Charlesworth v. Macdonald*,² I do not think it can be said to afford us any assistance, because the question in that case arose in Zanzibar, where the Specific Relief Act has no application. With regard to Mr. Grant's contention that section 57 only applies to what I have described as

¹ I. L. R., 14 Mad., 18.

² I. L. R., 23 Bom., 103.

cases like *Lumley v. Wagner*,¹ it has to be observed that one of the illustrations to section 57, viz., illustration (c) is a re-production of the decision in *Lumley v. Wagner*. But that is only one of the five illustrations. The other illustrations relate to facts which are quite distinct from the facts which were in question in *Lumley v. Wagner*. That, I should have thought, was decisive as to the question whether the Legislature intended that section 57 should only apply to cases falling under section 21 (b). If the Legislature intended that section 21 should apply nothing would have been easier than to have said so. It seems to me it may well be that the Legislature designedly adopted these general terms for the purpose of avoiding in this country the difficulties which have arisen in the English Courts with regard to cases of this character—difficulties which resulted in the English authorities being somewhat confused and not altogether reconcilable.’

Though section 57 includes the words ‘notwithstanding section 56, clause (f),’ (that is, ‘an Injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced’), still the discretion of the Court, which must always be exercised before granting an Injunction (section 52), must be the discretion set forth in section 22, which recites cases in which the Court may properly exercise a discretion not to decree specific performance. It is true that section 56, clause (f), speaks of contracts, the performance of which *would not* be specifically enforced, but section 57 says that ‘the circumstances that the Court is *unable* to compel specific performance of the affirmative agreement, &c.’ This apparently relates to section 21, which treats

¹ 1 D. M. G., 604.

from granting an Injunction, yet in the exercise of a sound discretion it may refuse to grant it.¹

The discretion of the Court which must always be exercised before granting an Injunction,² whether in a case arising under section 57 of the Specific Relief Act or otherwise must be the discretion set forth in section 22 of that Act which recites cases in which the Court may properly exercise a discretion not to decree specific performance.³ The Court will bear in mind that to grant an Injunction may amount in substance, although not in form, to a decree for specific performance. And therefore, the same considerations which would prevent it from giving a plaintiff a decree for specific performance of the contract ought to prevent it from granting an Injunction.⁴

(a) Delay.

The delay of either party in not performing the terms of the contract on his part or in not prosecuting his right to the interference of the Court by the institution of an action, or in not diligently prosecuting his action when instituted, may constitute such laches as will disentitle him to the aid of the Court.⁵ It is not possible, however, to say exactly what amount of delay will bar the right to relief, for each case must depend upon its own circumstances.⁶

(b) Unfair advantage.

The Court may properly exercise a discretion not to decree specific performance, and, therefore, not to issue an Injunction, where the circumstances under which the contract was made were such as to give the plaintiff an

¹ *Callianji Harjivan v. Narsi Tricam*, I. L. R., 18 Bom., 702, 716 (1894).

² Act I of 1877, ss. 52, 54.

³ *Callianji Harjivan v. Narsi Tricam*, I. L. R., 18 Bom., 702, 715 (1894) S. C. in appeal, I. L. R., 19 Bom., 764,

768 (1895).

⁴ *Ib.*, I. L. R., 19 Bom., 768.

⁵ Fry, *op. cit.*, § 1100, and see generally *ib.*, Ch. XXV and *ante*, pp. 118—124.

⁶ *Mokund Lal v. Chotay Lal*, I. L. R., 10 Cal., 1011, 1068 (1884).

unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.¹

There are many instances in which, though there is nothing that actually amounts to fraud, there is, nevertheless, a want of that equality and fairness in the contract, which are essential to the grant of relief by specific performance. Unfairness may exist either in the terms of the contract itself or in matters extrinsic, and the circumstances under which it was made, such as intimidation, duress, mental incapacity, age, poverty, manner in which the contract was executed, inadequacy of price, absence of legal advice, intoxication, injury to third persons, undue advantage, breach of trust or duty.²

The circumstances in the case of *Callianji Harjivan v. Narsi Tricum*³ were held to be within this rule, and the Court accordingly refused to grant the Injunction for which prayer was made.

Callianji Harjivan v. Narsi Tricum.

In this case the plaintiff sued for an Injunction to restrain the defendant from carrying on the business of a tailor or cutter for a period of 10 years from the 1st February 1893, on which day an agreement was made between them, which the plaintiff in this suit sought to enforce. By that agreement the defendant had contracted to enter into the plaintiff's employment and to serve him for 10 years at a remuneration of Rs. 37 a month.

The defendant was formerly in the plaintiff's service. He had left it, and it was alleged that when he left it, the plaintiff had large claims against him in respect of moneys for which he had not accounted. The plaintiff instituted criminal proceedings in the Police Court against him, and those proceedings were pending in January 1893. The

¹ Act I of 1877, s. 22, cl. (i).

² Fry, *op. cit.*, Ch. V, *passim*.

³ L. L. R., 18 Bom., 702, 715, 713

(1894), S. C. in appeal, I. L. R., 19 Bom., 764, 768, 769 (1895).

defendant, however, was out on bail and had obtained employment in another milliners' shop [in Bombay, carried on by one *B. J.*, in which service he had remained ever since.

This was the position of the parties when the negotiations between them began in January 1893. In the course of these negotiations the defendant was told that the Police Court proceedings against him would be abandoned. It was said, however, that the abandonment of these proceedings was quite independent of the agreement with the defendant, who indeed himself said that the plaintiff's solicitor told him that in any case the criminal case was to be withdrawn. The case was postponed for a fortnight, and ultimately, *viz.*, on the 15th February 1903, it was dismissed.

The defendant was then in the service of *B. J.* Subsequently, the plaintiff called upon him to leave it and to enter his employment, as he had undertaken to do by the agreement of the 1st February 1893, and the defendant refused. Upon these facts the Court observed as follows :—

“Now we think it is impossible to believe that in entering into this agreement with the plaintiff the defendant was not influenced by the idea that by doing so he was getting rid of the criminal charge against him. It is surely much more likely that this was his object than that he should have been led to do so by a desire to re-enter the plaintiff's service. The case was pending against him and might be proceeded with, and it was, no doubt, a matter of great importance to him that it should be withdrawn. If that was so, it is clear that the parties at the time of making the agreement cannot be said to have been on equal terms. The defendant was at a disadvantage. He was to some extent in the power of the

plaintiff, and he was apparently without any legal advice. Thus situated, and without taking any time for consideration, he signed the agreement. If we look at the terms of the agreement, we find it to be one which we think it is unlikely that a man would sign unless under some pressure of circumstances, for by it the defendant bound himself to serve the plaintiff for a long period of time, and during all that time his remuneration was to remain the same. Having regard to these circumstances, we think that the parties to the agreement of the 1st February were not on equal terms, and that the Judge of the lower Court was right in refusing either to grant specific performance of the agreement or an Injunction against the defendant."¹

Other illustrations given of this principle by the Specific Relief Act² are the following :—

(a) *A*, a tenant-for-life of certain property, assigns his interest therein to *B*. *C* contracts to buy, and *B* contracts to sell, that interest. Before the contract is completed, *A* receives a mortal injury from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact, *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*.³ (b) *A* contracts to sell to *B* the interest of *C* in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that *C*'s interest is worth nothing. In fact, the value of *C*'s interest depends on the result of certain partnership accounts on which he is heavily in debt to his partners. This indebtedness is

¹ *Callianji Harjivan v. Narsi Tricum*, I. L. R., 19 Bom., 764, 769 (1896) and see I. L. R., 18 Bom., at pp. 715, 716 (1894).

² Act I of 1877, s. 22, cl. (i).

³ See *Ellard v. Llandaff*, 1 Ball & B., 241.

known to *A*, but not to *B*. Specific performance of the contract should be refused to *A*.¹ (c) *A* contracts to sell, and *B* contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know of this circumstance, and *A* conceals it from him. Specific performance of the contract should be refused to *A*.² (d) *A*'s property is put up to auction. *B* requests *C*, *A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*.³

(e) *Hardship*. The Court may also properly exercise a discretion not to decree specific performance and therefore not to issue an Injunction, where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff.⁴ Relief may be given on this ground although the party seeking specific performance may be free from the least impropriety of conduct. The question of the hardship of a contract is generally to be judged of at the time at which it is entered into. The Court will not interfere where the hardship has been brought upon the defendant by himself; or where the hardship consists in the fact that the object which a party had in view in entering into the contract has become impossible. Further in suits against Companies the Court will not consider the hardship which

¹ See *Smith v. Harrison*, 26 L. J. Ch., 412.

² See *Shirley v. Stratton*, 1 Bro. C. C., 140.

³ See *Twining v. Morris*, 2 Bro. C. C., 326.

⁴ Act I of 1877, s. 22, cl. (2); *Fry, op. cit.*, Ch. VI.

may result to the individual members from enforcing a contract made with the whole body.¹

The following illustrations are given of this provision by the Specific Relief Act :—

(e) *A* is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to *B*. *A*, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to *C*. Here, the enforcement of the contract would operate so harshly on *A*, that the Court will not compel its specific performance in favour of *C*.² (f) *A* and *B*, trustees, join their beneficiary, *C*, in a contract to sell the trust-estate to *D*, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D*.³ (g) *A*, the owner of an estate, contracts to sell it to *B*, and stipulates that he, *A*, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to *B* unless he waives his claim to the unknown property.⁴ (h) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that *A* cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it

¹ Fry, *op. cit.*, §§ 417, 418, 426—428

² This illustration which is taken from the case of *Faine v. Brown*, 2 Ves. Sen., 307, exemplifies the rule

that forfeiture is a circumstance of hardship, see also *Illust. (h), post.*

³ See *Wedgwood v. Adams*, 6 Beav., 600; 8 *ib.*, 103.

⁴ See *Basendale v. Scale*, 19 *ib.*, 601.

may be held that he is entitled to specific performance of the rest with compensation for loss of the road.¹ (i) *A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*.² (j) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.³ (k) *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods, but if he does not supply them *A* may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*.⁴

(d) Partial performance.

On the other hand, the Court may properly exercise a discretion to decree specific performance and issue an Injunction where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.⁵ So if *A* sells land to a railway company, who contract to execute certain works for his convenience, and the company take the land and use it for their railway; specific performance of the contract to execute the works should be decreed in favour of *A*.⁶

¹ See *Peacock v. Penson*, 11 Beav., 355. (k).

² See *Talbot v. Ford*, 13 Sim., 173.

³ See *Denne v. Light*, 26 L. J., Ch., 459.

⁴ Act I of 1877, s. 22, Illustrs. (e)—

⁵ *Ib.*, s. 22, cl. (3); Fry, *op. cit.*, §§ 381, 103, 106.

⁶ *Ib.*, *illustr.*; see *Storer v. Great Western Ry. Co.*, 2 Y. & C. C. O., 48; Fry, *op. cit.*, §§ 103, 106.

Independently of strictly legal considerations the merits of the case may preclude the interference of the Court for, to use the language of Lord Cairns in *Eley v. Positive Government Security Life Assurance Company*,¹ the contract may be not one which ought to receive any special favour from the Court.²

Except as otherwise provided by Chapter II of the Specific Relief Act, the specific performance of a contract may be obtained by—(a) any party thereto ; (b) the representative in interest, or the principal, of any party thereto : Provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ; (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ; (d) where the contract has been entered into by a tenant-for-life in due exercise of a power, the remainderman ; (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant ; (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ; (g) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which

(vi) For whom contracts may be specifically enforced.

¹ 1 Ex. D., 20.

(1881) ; *Callianji Harjivan v. Narsi*

² *Nusserwanji Merwanji Panday v. Gordon*, I. L. R., 6 Bom., 266, 284

Tricum, I. L. R., 18 Bom., 702, 714 (1894).

arises out of the amalgamation ; (*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.¹

(vii) For whom contracts can not be specifically enforced.

Specific performance will not be enforced where there is any personal bar to relief within the meaning of section 24 of the Act, nor in the case of contracts to sell property by one who has no title or who is a voluntary settler.

(a) Personal bars to the relief.

Specific performance of a contract cannot be enforced in favour of a person²—(*a*) who could not recover compensation for its breach ; thus *A*, in the character of agent for *B*, enters into an agreement with *C* to buy *C*'s house. *A* is in reality acting not as agent for *B* but on his own account. *A* cannot enforce specific performance of this contract ;³ (*b*) nor in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;⁴ thus (*i*) *A* contracts to sell *B* a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. *A* becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract. (*ii*) *A* contracts to sell *B* a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. *A*, without *B*'s consent, fells the trees. *A* cannot enforce specific performance of the contract. (*iii*) *A*, holding land under a contract with *B* for a lease, commits waste, or treats the land in an unhusbandlike manner. *A* cannot enforce specific perform-

¹ Act 1 of 1877, s. 23. See generally as to the parties to the action. Fry, *op. cit.*, Part II, Chs. 1—6.

² s. 24, *ib.*

³ *ib.*, see Fry, *op. cit.*, § 229.

⁴ *ib.*, see Fry, *op. cit.*, §§ 949, 950, 952, 955, 956, 957—959, 964—961, 988.

ance of the contract. (iv) *A* contracts to let, and *B* contracts to take, an unfinished house, *B* contracting to finish the house and the lease to contain covenants on the part of *A* to keep the house in repair. *B* finishes the house in a very defective manner: he cannot enforce the contract specifically, though *A* and *B* may sue each other for compensation for breach of it; (c) nor will specific performance be enforced in favour of a person who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; thus *A* contracts to let, and *B* contracts to take, a house for a specified term at a specified rent. *B* refuses to perform the contract. *A* thereupon sues for, and obtains, compensation for the breach. *A* cannot obtain specific performance of the contract; nor (d) in favour of a person who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.¹

A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor² :—

(b) Contracts to sell property by one who has no title or who is a voluntary settler.

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the same;³ thus *A* without *C*'s authority, contracts to sell to *B* an estate which *A* knows to belong to *C*. *A* cannot enforce specific performance of this contract, even though *C* is willing to confirm it.

(b) who, though he entered into the contract believing that he had a good title to the property, cannot, at the time fixed by the party or by the Court for the completion of the sale or letting, give the purchaser or

¹ Act I of 1877, s. 24.

Act I of 1877, s. 25.

³ See Fry, *op. cit.*, § 878.

lessee a title free from reasonable doubt.¹ Thus *A* bequeathes his land to trustees declaring that they may sell it with the consent in writing of *B*. *B* gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with *C* to sell him the land. *C* refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of *B*'s consent to the particular sale to *C*, the title which they can give *C* is, as the law stands, not free from reasonable doubt. Again, *A*, being in possession of certain land, contracts to sell it to *Z*. On enquiry it turns out that *A* claims the land as heir of *B*, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. *A* cannot compel *Z* specifically to perform the contract.

(c) who previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.² Thus *A*, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. *A* cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it,³ and an Injunction may be granted against him to restrain the sale. Thus *A* makes a settlement (not founded on marriage or other valuable consideration) of an estate on *B* and his children. *A* then contracts to sell the estate to *C*. *B* or any of his children may sue for an Injunction to restrain the sale.⁴

¹ See *ib.*, §§ 878—891; *Haji Mahomed Mitha v. Musaji Esaji*, I. L. R., 15 Bom., 657 (1891).

² *Fry, op. cit.*, § 890.

³ Act I of 1877, s. 25.

⁴ S. 54, *ib.*, ill. (g).

For certain persons, contracts cannot be specifically enforced, except with a variation. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely)¹ :—

(viii) Non-enforcement except with variation.

(a) where by fraud or mistake of fact² the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it; (b) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff; (c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil; (d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce; (e) where the parties have, subsequently to the execution of the contract, contracted to vary it.³ Thus (i) *A*, *B* and *C* sign a writing by which they purport to contract each to enter into a bond to *D* for Rs. 1,000. In a suit by *D*, to make *A*, *B* and *C* separately liable each to the extent of Rs. 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint-bond for Rs. 1,000. *D* can obtain the performance sought only with the variation thus set up. (ii) *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he

¹ Act I of 1877, s. 26, see *Narain Patro v. Aukhoy Narain Manna*, I. L. R., 12 Cal., 152, 155 (1885).

² See *Fry, op. cit.*, Chs. XIV & XV.

passim.

³ As to agreements on new terms, see *Fry, op. cit.*, § 1031, *et seq.*

assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*. (iii) *A* contracts in writing to let to *B* a wharf, together with a strip of *A*'s land delineated in a map. Before signing the contract, *B* proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of *A*'s land of the same dimensions, and to this *A* expressly assented. *B* then signed the written contract. *A* cannot obtain specific performance of the written contract, except with the variation set up by *B*. (iv) *A* and *B* enter into negotiations for the purpose of securing land to *B* for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on *B*. The contract so framed cannot be specifically enforced. (v) *A* contracts in writing to let a house to *B* for a certain term at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with *B*'s consent, *A* pulls it down and erect a new house in its place : *B* contracting orally to pay rent at Rs. 120 per mensem. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.¹

(ix) Against whom contracts may be specifically enforced.

Except as otherwise provided by Chapter II of the Specific Relief Act, specific performance of a contract may be enforced against² :—

(a) either party thereto ;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee

¹ Act I of 1877, s. 26.

² S. 27, *ib.*

for value who has paid his money in good faith and without notice of the original contract.¹ Thus (i) *A* contracts to convey certain land to *B* by a particular day. *A* dies intestate before that day without having conveyed the land. *B* may compel *A*'s heir or other representative in interest to perform the contract specifically. (ii) *A* contracts to sell certain land to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*. (iii) *A* contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no enquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*. (iv) *A* contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to *B*. Immediately after the contract *A* dies intestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*. (v) *A* contracts to sell certain land to *B*. Before the completion of the contract, *A* becomes a lunatic and *C* is appointed his committee. *B* may specifically enforce the contract against *C*.

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant. Thus (i) *A*, the tenant-for-life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is tenant-for-life, contracts to sell the estate to *C*, who has notice of the settlement. Before the sale is

¹ See Fry, *op. cit.*, §§ 211, 221, 241; *Krishna Sunder Roy*, I. L. R., 10 Cal., 710 (1884); *Gumani v. Ram Charan*, 229 (1889); *Chunder Kant Roy v.* I. L. R., 1 All., 555 (1878).

completed *A* dies. *C* may enforce specific performance of the contract against *B*. (ii) *A* and *B* are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C* and dies. *C* may enforce specific performance of the contract against *B*.

(d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company, provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.¹

(x) Against whom contracts cannot be specifically enforced.

Specific performance of a contract cannot be enforced against a party thereto in any of the following cases²:—

(a) if the consideration to be received by him is so grossly inadequate,³ with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff; (b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; (c) if his assent was given under the influence of mistake of fact, misapprehension or surprise : Provided that, when the contract

¹ Act I of 1877, s. 27. Clauses (d) and (e) are the converse cases to those mentioned in cls. (g) & (h) of s. 23, *ante*. See *Imperial Ice Manu-*

facturing Co., Ltd. v. Muncherchaw, I. L. R., 13 Bom., 415 (1889).

² Act I of 1877, s. 28.

³ See *Fry, op. cit.*, Ch. vii, *passim*.

provides for compensation in case of mistake compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced, in other respects if proper to be so enforced. Thus *A*, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to *B* of his testator's property. *B* cannot insist on the sale being completed. Again, *A* directs an auctioneer to sell certain land. *A* afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to *B*, who has not notice of the revocation. *B* cannot enforce specific performance of the agreement.¹

§ 61. So far the subject of Injunctions as affecting contracts generally has been dealt with, but there are certain particular forms of contract or transfer of property which require separate comment, namely, those connected with partnerships, companies, clubs and societies, mortgages and leases.

The subject of partnership is dealt with by Chapter XI of the Contract Act, sections 253, 257—259 whereof in particular define the general rules determining partners, mutual relations and the general duties of partners. Partnership is a relation, which in various ways calls for the action of a Court of Equity; as for the purposes of discovery, account, specific performance, and dissolution; and in connection with some or all of these main objects, and in some instances without reference to any ulterior end, partnership is made the subject of Injunction.² The application of the doctrine of specific performance to

Injunction in certain particular cases of contract or transfer of property.

(i) Injunctions between partners.

¹ Act I of 1877, s. 28.

² Hilliard, *Inj.* p. 485 *et seq.* See generally Kerr, *Inj.* Ch. XV; Lindley

on Partnership, 525; Joyce's *Inj.*, 511; High, *Inj.*, Ch. XXIII; Spelling's Extraordinary Relief, Ch. XIII.

partnerships is governed by the same rules as those which govern it in other cases.¹

The Court will not, generally speaking, enforce a contract to enter into a partnership, whilst it remains executory. It will not, as a general rule, enforce specific performance of a contract to form and carry on a partnership; nor will it in any case compel performance of a contract to enter into a partnership not for a definite term.² "The natural remedy for a breach of an agreement to enter into a partnership is an action for damages; and there exists only two classes of cases in which the specific performance of such an agreement has been decreed. (I) Where the parties have agreed to execute some formal instrument which would confer rights, which would not exist unless it was executed. *England v. Curling*³ is a case of this kind."⁴ Where the contract defines the terms of the partnership and there has been part-performance of the contract, the Court may specifically execute it by decreeing the parties to execute a proper deed, and, if necessary, by restraining any partner from carrying on business under the partnership style with other persons, and from publishing notices of dissolution.⁵ "(II) Where there has been an agreement which has come to an end to carry on a joint adventure, and the decree that the agreement is a valid agreement, prefaced by the declaration that the contract ought to be specifically performed is made merely as the foundation of a decree for an account. *Dale v. Hamilton*⁶ is an instance of this class of cases."⁷

¹ *Virdachala Nattan v. Ramaswami Nayakan*, 1 Mad. H. C. R., 341 (1863).

² See Fry on Specific Performance, §§ 843, 1540. *Scott v. Rayment*, L. R., 7 Eq., 112; Lindley on Partnership, 478.

³ 8 Beav., 129.

⁴ *Virdachala Nattan v. Ramaswami*

Nayakan, supra.

⁵ Fry, *op. cit.*, § 1511.

⁶ 5 Ha., 369; S. C., on appeal, 2 Phil., 266.

⁷ *Virdachala Nattan v. Ramaswami Nayakan*, 1 Mad. H. C. R., 341, 347 (1863). The Court further observed,

"From the earliest to the latest cases

When, however, a partnership has been already entered into, the Court will restrain by Injunction one or more of its members from doing acts inconsistent with the terms of the partnership-agreement or (independently of any agreement) with the duties of a partner.¹ A member of a joint Hindu family cannot maintain a suit for an account of the profits of a partnership which is alleged to be joint family-property, and an award of his share in such profits when ascertained. But this rule of Hindu law does not prevent an Injunction being granted in cases in which one member of the family is prevented from taking part in the business of the firm.²

A distinction must be kept between executory and executed contracts, a familiar illustration of which occurs in the case of partnership-articles. The cases in which Courts of Equity give specific relief on partnership-articles and they are many, are not cases of specific performance of executory contracts. Though the Court will not, generally speaking, enforce a contract to enter into a partnership, whilst it remains executory; yet nevertheless when the partnership has been constituted, the Court will by Injunction enforce the performance of particular terms, though it may be incompetent to enforce all the terms.³ The Courts will interfere by Injunction between parties where the conduct of the defendant, either by misapplying the monies of the co-partnership or by

upon the subject, it will be found, we believe, that a Court of Equity has never made a decree for the specific performance generally of a partnership. In decreeing specific performance, the Court has always to consider whether it can enforce the whole of the agreement, and where it cannot do so, this peculiar relief will always be refused. Here it would

be quite impossible for the Court to compel the parties to carry out their own partnership relations; a decree for a specific performance would therefore be a mere *brutum fulmen*."

¹ Kerr, *Inj.*, 510 *et seq.*; Lindley on Partnership, 525.

² *Ganpat v. Anaji*, I. L. R., 23 Bom., 144 (1898).

³ Fry, *op. cit.*, §§ 843, 1545.

doing acts tending to the waste or destruction of the partnership-property, or by excluding from the business a partner entitled to join in it, or the like, is practically violating the partnership-contract. It will enjoin a party from doing any act to prevent the partnership being carried on according to the articles. This will sometimes be granted where the partnership is dissoluble at will, but always where it is a partnership for a definite period.¹ But the Court will not interfere in all cases of misconduct to grant an Injunction against one partner at the suit of another. Mere disagreements or quarrels arising from bad temper and improprieties of conduct are not a sufficient ground. Unless a partner excludes his co-partner or persists in violating partnership-articles of importance, or is conducting himself so grossly as to render it impossible for the business to be carried on in a proper manner, the Court will not interfere.² A Court will also restrain a person from holding out another as partner with him, without the authority of that other.³

Contracts for partnership may be illegal; in which case the Court will not in any way interfere for the benefit of parties claiming under such contracts, or in favour of contracts for partnership tainted with fraud, hardship, or improper conduct.⁴ Where the partnership is illegal no rights can be enforced by Injunction under the agreement by which it has been constituted.⁵

A partner seeking an Injunction must show that he is able and willing to perform his own part of the

¹ *Virdachala Nattan v. Ramaswami Nayakan*, 1 Mad. H. C. R., 341, 348 (1863). See Act I of 1877, s. 54, ill. (1), a case of partnership dissoluble at will.

² Kerr, *Inj.*, 515; Lindley on

Partnership, 530.

³ Act I of 1877, s. 54, ill. (x); Lindley, *op. cit.*, 531.

⁴ Fry, *op. cit.*, § 1543.

⁵ *Bhikaji Sabaji v. Bapu Saju*, 1 L. R., 1 Bom., 550 (1877).

agreement and has fulfilled the duties incumbent on himself.¹ However improper the conduct of his co-partner may have been a partner may by his own acts,² or acquiescence,³ debar himself of relief. For in this as in all other cases the applicant must come to the Court with clean hands.

The Court may grant relief either by means of the issue of an Injunction or the appointment of a Receiver or by the grant of both forms of relief. An Injunction only excludes from the management of the partnership-affairs the person against whom it is granted, whilst the appointment of a Receiver which operates as an Injunction excludes all the partners equally, the Court taking upon itself, through the Receiver, the management of the partnership-business. The Court will not appoint a Receiver unless it sees that there is an actual present dissolution arising from the acts of the parties or that it would dissolve the partnership at the hearing.⁴ It therefore does not follow that because the Court will grant an Injunction it will also appoint a Receiver, or that because it refuses to appoint a Receiver it will also decline to interfere by Injunction.⁵

The latter relief may be granted : (a) without a view to dissolution : or (b) pending and after dissolution.

An Injunction will not be refused in partnership-cases simply because no dissolution is sought. To hold otherwise might have the result of enabling a person to compel his partner to submit to the alternative of dissolution or ruin by a continued violation of the partnership-contract.

¹ Lindley, *op. cit.*, 531; Kerr, *Inj.*, 516; *Smith v. Froment*, 3 Swanst., 330; *Court v. Harris, T. & R.*, 524.

² *Ib.*, *Littlewood v. Caldwell*, 11 Price, 97 (where an Injunction was refused because the plaintiff had taken

away the partnership-books).

³ *Glassington v. Thwaites*, 1 Sim. & St., 125.

⁴ *Joyce's Inj.*, 512.

⁵ Lindley, *op. cit.*, 525; Kerr, *Inj.*, 517.

(a) Without a view to dissolution.

Anciently however Courts of Equity declined to interfere, except where dissolution was sought. But evident as it is that the necessity for applying for relief virtually imperils the success of a partnership-enterprise, the jurisdiction to enjoin a partner from doing that which seriously interferes with the business, or which is a breach of the agreement, in a suit which does not seek dissolution is now well established.¹ So Injunctions will be granted restraining the exclusion of a partner or the committal of improper acts by a member of a partnership. Where the partnership is determinable at will, there is, it is said,² more difficulty in interfering, if a dissolution is not sought, for supposing the Court to interfere, the defendant may immediately dissolve the partnership. But supposing him to do so, an Injunction will not necessarily be futile, inasmuch as so long as it continues in force, the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot, *per se*, operate as a dissolution of the Injunction.³

(b) Pending and
after dissolution.

In an action instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership is dissolved, it has never been doubted that an Injunction will be granted to restrain one of the partners from doing any act which will impede the winding up of the concern or damage the property of the firm.⁴ In a suit brought by the representative of a deceased partner to wind up the partnership, an Injunction may be issued at the instance of the plaintiff against the surviving partner prohibiting him from collecting debts due to the

¹ Lindley, *op. cit.*, 525; Spelling's Extraordinary Relief, § 587; Kerr, *Inj.*, 510. See Act I of 1877, s. 54

(1) where it is stated that an Injunction will be granted without seeking a dissolution of the partnership.

² See *Peacock v. Peacock*, 16 Ves., 49; *Miles v. Thomas*, 9 Sim., 606.

³ Lindley, *op. cit.*, 527.

⁴ Lindley, *op. cit.*, 528; Kerr, *Inj.*, 512-515; High, *Inj.*, § 1342.

firm;¹ though leave may be given to apply for the recovery of debts which might become barred by limitation.² So after a dissolution the Court constantly interferes by Injunction to restrain breaches of special agreements entered into between the partners; such for example as agreements not to carry on business, not to get in debts of the firm, not to divulge a trade-secret and the like.³ While the objections to the interference by Injunction are less strong after dissolution than before, yet even then some urgent and pressing necessity must be shown to induce the Court to sustain the Injunction.⁴

An Injunction may be granted to restrain Companies⁵ from the commission of illegal acts, or the violation of the duties which attach to the relation of shareholders and directors, *inter se*. The principles on which the Court interferes in restraining a Company from doing illegal acts are the same as those on which it interferes in other cases. If it is clear that there is a right and a violation of that right likely to result in serious injury the Court will protect the right by Injunction. Acts on the part of a Company may be illegal either (1) as against the public, or (2) as against third parties, or (3) as against individual members of the Company or as against the general body of the members, or they may be in violation of the duties which bind in equity the directors and shareholders.⁶

(ii) Injunctions against Companies.

(a) Acts affecting the public.

¹ *Shunmugam v. Moidin*, *post*; *Rajaratnam v. Shivalayammal*, I.L.R., 11 Mad., 103 (1887).

² *Shunmugam v. Moidin*, I.L.R., 8 Mad., 229 (1884).

³ *Lindley*, *op. cit.*, 528, 529; *Kerr*, *Inj.*, 512—515. See Act IX of 1872 (Contract), § 27.

⁴ *High. Inj.*, § 1344.

⁵ See Act VI of 1882 (Indian Companies) amending the law relating to the incorporation, regulation and winding-up of Trading Companies and which extends to the whole of British India.

⁶ *Kerr*, *Inj.*, 529. See *ib.*, Ch. XVIII, *passim*; *High. Inj.*, Ch. XX.

(b) Third parties.

of the public calls for its interference.¹ The Courts have an undoubted jurisdiction of restraining corporations or companies from acting in excess of their powers when such excess causes injury to an individual or a larger or smaller portion of the public.² In the second case the complainant must show that the act prohibited has caused him some special injury beyond that which he may be supposed to sustain in common with the rest of the public by an infringement of the law.³ If a corporation or public company were to do or attempt to do any act in excess of their powers and such acts would be injurious to the rights of property of an individual, the latter has a right to the protection of the Court by Injunction or other appropriate relief.⁴ A person or a body of persons having statutory authority for the construction of works should exercise their powers with ordinary care and skill and with some regard to the property and rights of others. Such powers are granted on the condition—sometimes expressed and when not expressed always understood—that the undertakers of the work should do as little damage as possible in the exercise of their statutory powers. When the powers conferred by statute are exceeded or abused, the remedy of a person injured in consequence is by action or suit and not by a proceeding for compensation under the statute which has been so transgressed.⁵ A simple contract-creditor cannot maintain an action to restrain a Company from dealing with their assets as they please, on the ground that they are diminishing the fund

¹ *Ib.*, 531.

² *Shepherd v. The Trustees of the Port of Bombay*, 1. L. R., 1 Bom., 141 (1876).

³ *Kerr*, 532. As to the interest required to support the suit, see *Vaman v. Municipality of Sholapur*, 1. L. R., 22 Bom., 646 (1897).

⁴ *Shepherd v. The Trustees of the Port of Bombay*, 1. L. R., 1 Bom., 142 (1876), cited in *Vaman v. Municipality of Sholapur*, 1. L. R., 22 Bom., 651 (1897).

⁵ *Gaekwar of Baroda v. Gandhi Kachrabhai Kasturchand*, 7 C. W. N., 393 (1903).

for the payment of debts.¹ In the third case the general rule is that the Court will not interfere between members of Companies for the purpose of enforcing alleged rights arising out of matters which are properly the subject of internal regulation.² The Court will, however, interfere by Injunction in certain cases to control majorities, and so any shareholder can obtain the aid of the Court to prevent an act which is *ultra vires*, even though resolved upon by all the other shareholders.³ Further the acts of a Company may be illegal as against an individual member of the Company, and where such is the case, a shareholder may sue the Company to restrain an individual injury to himself. So an Injunction has been granted to restrain the improper insertion or continuance of a person's name on a Company's prospectus, or in the register of shareholders, the illegal forfeiture of shares, the illegal suspension of a shareholder from his rights, the improper rejection of his vote and the like.⁴ Companies formed for a special purpose are looked upon in Equity as analogous to a partnership and the members in their individual capacity are considered to have rights *inter se* analogous to those of partners *inter se*.⁵ Any shareholder has a right to say that the business of the company shall be carried on according to the agreement which united the shareholders, and may restrain the company from applying the common fund to any other purpose than the proper purposes of the concern in which he was induced to engage, and contracts not within the proper purposes

¹ *Mills v. Buenos Ayres Co.*, 5 Ch. D., 821.

² Lindley on Companies, 5th ed. (1891), 574 *et seq.*; Kerr, *Inj.*, 554 *et seq.*; but in particular cases of urgency, irreparable mischief and fraud the Court has interfered;

Kerr, Inj., 556 *et seq.*

³ Lindley, *op. cit.*, 314 *et seq.*

⁴ *Ib.*, pp. 596—602, where the cases in which the Court has and has not interfered will be found collected; Kerr, *Inj.*, 535.

⁵ *Simpson v. Denisson*, 10 Hs., 51.

of the Company are void.¹ So if the directors of a public company are about to pay a dividend out of capital or borrowed money, or if the directors of a fire and life insurance company are about to engage in marine insurances, any of the shareholders may sue for an Injunction to restrain them.² In this as in all other cases the conduct of the applicant or his delay and acquiescence may prove a bar to the grant of relief;³ and if a contract between two Companies is illegal, the Court will not assist either of the parties in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object of the agreement.⁴ Contracts not within the proper purposes of the Company are void, though the doctrine of *ultra vires* will be reasonably applied so as not to exclude whatever may be fairly regarded as incidental to, or consequential upon, those things which have been authorized.⁵ An act, which is *ultra vires* the Company, being void is incapable of ratification. But an act although it may be beyond the powers of the directors, may be capable of being adopted and confirmed at a meeting of the shareholders as a body, and, if so, the Court will not interfere until attempts have been made to take the sense of the general body of

¹ See Act I of 1877, s. 21, cl. (f); Kerr, *Inj.*, 535, 536 *et seq.*; 546 *et seq.*

² Act I of 1877, s. 54, ill. (c) & (d); as to the last illustration, see *Natusch v. Irving*, cited in Lindley, *op. cit.*, 597. See *Vaman v. Municipality of Sholapur*, 1 L. R., 22 Bom., 648 (1897), High, *Inj.*, s. 1224.

³ See Kerr, *Inj.*, 538—540.

⁴ *Great Northern Railway Co. v. Eastern Counties Railway Co.*, 9 Ha., 306; *Richmond Waterworks Co. v. Vestry of Richmond*, 3 Ch. D., 98.

⁵ Kerr, *Inj.*, 546, 547. No specific performance or Injunction can be granted of or in respect of a contract made by or on behalf of a corporation or public company created for special purposes or by the promoters of such Company, which is in excess of its power; Act I of 1877, ss. 21 (f), 56 (f). As to suits against Companies on account of contracts entered into by them or by their promoters, see *Ib.*, ss. 23, cl. (j), (k), 27 (d), (e).

the shareholders on the matters in question.¹ Though the Court under certain circumstances might have the power of so framing an order for an Injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet it cannot order such body to pass and record a resolution dictated by the Court.²

A club is a voluntary association of a number of persons meeting together for purposes mainly social, each contributing a certain sum either to a common fund for the benefit of the members, or to a particular individual, namely, the proprietor for his own benefit.³ A club, as a body, has no position recognised in law,⁴ and although frequently confounded with other voluntary associations, it is really an institution *sui generis*. The association to which it bears the closest resemblance is a partnership, though it is erroneous to treat it as such,⁵ or as a company,⁶ or corporation.⁷ Clubs proper may further be distinguished from societies which have been made subject to statutory rules such as those dealt with by the Friendly Societies Acts.⁸

(iii) Injunctions against clubs, societies, castes, &c.

An agreement to become a member of a club is a contract between the candidate of the one part and the

(a) Clubs and societies.

¹ Kerr, *Inj.*, 546—554; Fry on Specific Performance, ss. 491, 492, *v. ante*.

² *Shepherd v. The Trustees of the Port of Bombay*, 1 L. R., 1 Bom., 132 (1876).

³ Wertheimer's Law relating to Clubs, 2nd ed., 1889, p. 4.

⁴ *Steele v. Gourley*, 3 T. R., 119.

⁵ *Fleming v. Hector*, 2 M. & W., 172. The distinction between a partnership and a member's club lies in the fact that the object of a partnership is the acquisition of a common profit, while that of a club is to secure

social intercourse among the members.

⁶ In the matter of the *St. James' Club*, 2 D. M. & G., 383; Buckley's Companies Act, 5th ed., p. 2. In re *London Marine Association*, L. R., 8 Eq., 176; *Steele v. Gourley*, *supra*. There may however be a club-company: Wertheimer, 8—10.

⁷ *Steele v. Gourley*, *supra*.

⁸ As to Acts relating to Societies in India, see Acts I of 1880 (Religious Societies), XXI of 1860 (Literary, Scientific and Charitable).

proprietor, or the whole body of members as the case may be of the other part: and when a candidate has been elected and has had an opportunity of making himself acquainted with the rules of the club his relations therewith will depend absolutely upon the terms of such rules.¹ Persons who have become members of a member's club would appear to be entitled in equal proportions to all the property of the club, in proprietary clubs such property being vested in the proprietor.² The foundation of the jurisdiction of the Courts to prevent a member of a voluntary association from being improperly expelled is the right of property vested in such member of which he would be deprived by such expulsion.³ The Courts in England have no jurisdiction to decide upon the rights of persons to associate together when the association possesses no property.⁴ But in this country the position of non-voluntary associations such as caste-unions has to be considered. Both the English and Hindu law, however, distinguish between interference for the protection of property, liberty, security and reputation, and interference in matters of a purely social nature. So one person cannot be compelled to entertain another. Exclusion from

¹ See *Lyttleton v. Blackburn*, 45 L. J., Ch., 223; *Innes v. Wylie*, 1 C. & K., 264.

² *Wertheimer*, 17—20. See *Jagunnath Churn v. Akali Dossia*, 1. L. R., 21 Cal., 461, 470 (1893).

³ *Rigby v. Connel*, 14 Ch. D., 482; *Innes v. Wylie*, 1 C. & K., 262; *Neale v. Denman*, 18 Eq., 135; *Baird v. Wells*, 44 Ch. D., 661, 675.

⁴ *Rigby v. Connel*, *supra*, which was the case of a trade-union and where Sir George Jessel, M. R., says:—"Persons, and many persons, do associate together, without any property in common at all. A dozen

people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere." Therefore the Courts have no jurisdiction to interfere where a member of a proprietary club has been expelled. See *Lyttleton v. Blackburn*, 45 L. J., Ch., 219. *Wertheimer*, *op cit.*, 66, 67, the remedy of the aggrieved member being an action for damages. *Baird v. Wells*, 44 Ch. D., 661, 675.

mere social privileges of this kind gives no cause of action. Thus where a person sued for a decree declaratory of his right to the membership of a *somaj* (society), upon the allegation that the other members had excluded him from the *somaj* by their refusal to eat with him, it was *held* that as such exclusion neither deprived him of caste, nor affected any right of property, it was not cognizable by the Civil Court, and that even where rights of property are involved in the membership of societies or associations, yet if the main object of the association be of a social character, the members thereof are the sole judges whether a particular individual has so conducted himself as to entitle him to continue to be a member of the body.¹

In the case of voluntary associations, however, whether English or Hindu, the action of the members is subject to the superintendence of the Court according to the following rules :—

The Courts will not, as a general rule, sit as Courts of appeal from the decision of the members of clubs or other associations duly assembled. But it will interfere by Injunction to restrain the expulsion of, and to reinstate, a member in the following cases :²

(1) Where the action of the committee or the general meeting was not authorized by any rule, that is, where

¹ *Sudharam Patil v. Sudharam*, 3 B. L. R., A. C. J., 91 S. C. 11 W. R., 457 (1869), in which many of the earlier cases will be found cited. In this case the exclusion was not from caste, but only from a *somaj* or association of a purely social nature, and is, therefore, distinguishable from the cases relating to caste-unions and religious fraternities. *Jagannath Churn v. Akali Dossia*, I. L. R., 21 Cal., 470 (1893). See also *Raghunath Damodhar v.*

Janardhan Gopal, I. L. R., 15 Bom., 599 (1891); where the Court refused to interfere: the rule in question being a mere sumptuary rule and the question in suit a caste-question unconnected with property or legal right.

² *Baird v. Wells*, 44 Ch. D., 670 (1890); *Gompertz v. Goldingham*, I. L. R., 9 Mad., 321 (1886); *Jaganrath Churn v. Akali Dossia*, I. L. R., 21 Cal., 461, 470, 471 (1893); *Wertheimer*, *op. cit.*, 110; *Kerr. Inj.*, 531.

it is irregular, and not within the terms of any rule of the club or association. The rules of the club must be observed, and the formalities necessary for the expulsion of a member must be strictly complied with.¹

(2) Where what has been done, though it is within the rules of the club, is contrary to natural justice. Thus natural justice requires that where the conduct of a member is impugned, notice should be given to him that his conduct is about to be enquired into and that he should have an opportunity of stating his case and defending his conduct. A resolution passed without notice based upon *ex parte* evidence is void, and the Court will restrain a club by Injunction from interfering with a member's rights by virtue of such a resolution.²

(3) Where although in accordance with the rules of the club, the proceedings were not in the *bonâ fide* exercise of the powers given by the rule, but fraudulent and malicious.³

In other cases the Courts will not interfere. When the committee or general meeting has done all that the rules require, and has not acted contrary to natural

¹ *Dawkins v. Antrobus*, 17 Ch. D., 615; *Labouchere v. Lord Wharncliffe*, 13 Ch. D., 346; *Baird v. Wells*, 44 Ch. D., 670, 673.

² *Baird v. Wells*, 44 Ch. D., 670; *Fisher v. Keane*, 11 Ch. D., 353; *Innes v. Wylie*, 1 C. & K., 257, 263; *Dawkins v. Antrobus*, 17 Ch. D., 615; *Andrews v. Salmon* (1888), W. N., 102; *Seaton v. Gould*, 5 T. R., 309; *Buchanan v. Rucker*, 1 Camp., 66. The rule expressed in the maxim *audi alteram partem* is not confined to the conduct of strictly legal tribunals (as to which see *In re Hammer-smith Rent Charge*, 4 Exch., 96, 97); but is applicable to every tribunal or body of persons invested with authority to adjudicate upon mat-

ters involving civil consequences to individuals." *Wood v. Wood*, L. R., 9 Ex., 190, 196; *Russell v. Russell*, 14 Ch. D., 471; *Gompertz v. Goldingham*, L. R., 9 Mad., 321 (1886); *The Advocate-General of Bombay v. David Haim Devaker*, L. R., 11 Bom., 185, 195, 196 (1886) and cases there collected.

³ *Dawkins v. Antrobus*, 17 Ch. D., 623; *Baird v. Wells*, 44 Ch. D., 670; *Labouchere v. Lord Wharncliffe*, 13 Ch. D., 352; *Seaton v. Gould*, 5 T. R., 309; *Tantussi v. Molli*, 2 T. R., 731; *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq., 63; *The Advocate-General of Bombay v. David Haim Devaker*, L. R., 11 Bom., 185, 195 (1886).

justice then, unless there is proof of malice, the Courts will not interfere, even though, as a matter of fact, the decision was wrong.¹

In the case of a community which is a private and voluntary religious society resting upon a consensual basis (such as the members of the Beni-Israelite community worshipping at a synagogue in Bombay) the members may make rules for themselves, and may constitute a tribunal to enforce the rules, and the decision of that tribunal is binding when it has acted within the scope of its authority, and in a manner consonant with the general principles of justice. When the decision of a domestic tribunal has been arrived at *bonâ fide* the Court has no jurisdiction to interfere.² Such a community was, of course, not a caste, but as not only honorific distinctions were at stake, but also a share in the management of an endowment, and the right to an office of importance and authority, the Court was held to have jurisdiction.³

With regard to castes it has been decided in a large (b) Castes. number of cases that a suit for restoration to caste and for obtaining a declaration that the expulsion was not justified would lie in the Civil Courts.⁴

It has been held by the Bombay High Court that in the matter of expulsion from caste, the Courts treat caste-corporations like any other voluntary societies or

¹ Wertheimer, *op. cit.*, 77. See the following cases where the expulsion was upheld by the Courts: *Hopkinson v. Marquis of Exeter*, L. R., 5 Eq., 63; *Richardson Gardner v. Freemantle*, *ib.*, 68; *Lytleton v. Blackburn*, 33 L. T., 164; *Dawkins v. Antrobus*, 17 Ch. D., 615; *Lambert v. Addison*, 46 L. T., 20; *Harrison v. The Marquis of*

Abergavenny, 3 T. R., 625, 653; *Seaton v. Gould*, 5 T. R., 309.

² *The Advocate-General of Bombay v. David Haim Devaker*, I. L. R., 11 Bom., 185, 194, 195 (1886).

³ *Ib.*, 193, 194.

⁴ *Appaya v. Padappa*, I. L. R., 23 Bom., 122, 127 (1899) and cases there cited.

clubs. If there is jurisdiction and the procedure is fairly conducted and *bonâ fide*, the action of the caste-corporation or club is upheld.¹ Where this is not the case, the Courts will interfere² to secure the rights of a member who has been wrongly excluded from caste. Therefore where the enquiry as to the conduct of the alleged offending member has been *ex parte* and without notice to him³ and so contrary to natural justice : or where the decision is contrary to the rules of the caste or has not been come to *bonâ fide*,⁴ the Court will interfere by Injunction. The Calcutta High Court have, however, held that the jurisdiction to interfere in cases of this kind is of a more extended character ; that the rules laid down in the English cases as to expulsion from clubs or *voluntary* associations which people are free to join or not, and where any one who joins may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules, are not applicable with regard to caste-unions or religious fraternities in India, to which people belong not of choice but of necessity,

¹ *Appaya v. Padappa*, supra, at pp. 122, 129 (1898).

² As to the extent to which s. 21 of Reg. II of 1827 imposes a limitation on the power to interfere in caste-matters see *Appaya v. Padappa*, supra, at pp. 125, 129, 130, and cases there cited, where it was held that it is only suits with regard to matters which affect the internal autonomy of the caste, and its social relations that have been held to be barred by that Regulation and similar enactments in other parts of India. So the Court will not interfere in club questions so as to impair the autonomy of the club. *Pragji Kalan v. Gorind Gopal*, I. L.

11 Bom., 534, 536 (1887). As

long as a caste in passing a rule confines the enforcement of it to social caste-sanctions and does not seek to deprive a man of property or legal rights for disobeying it, the Court has no jurisdiction to enquire into the nature of the rule. *Raghunath Damodhar v. Janardhan Gopal*, I. L. R., 15 Bom., 599 (1891). See also *Lalji Shamji v. Walji Wordkman*, I. L. R., 19 Bom., 507 (1895), cited *post*.

³ *Appaya v. Padappa*, supra, and cases there cited.

⁴ *Jagannath Churn v. Akali Dossia*, I. L. R., 21 Cal., 463, 470, 471 (1893), and cases cited in this and the preceding case.

being born in their respective castes or sects, and the consequences of exclusion from which are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. In such religious castes or fraternities the protection of Courts of Justice, even though presided over by judges of a different religious persuasion, against expulsion is much more needed than in clubs or voluntary associations. Cases of expulsion from them are therefore cognizable by the Civil Court.¹ And still more recently the Bombay High Court have held that if possible for the reasons stated by the Judges who decided the case last cited, the Civil Courts have to be more careful in the matter of caste-expulsions than is necessary in the case of voluntary associations.²

In matters relating to the management of caste property and the administration of its affairs, the majority of the caste has authority to control the minority. The Court does not decline to give effect to the expressed wishes of the majority of the caste as to the management and custody of caste-property, which the minority seek to set at naught, by reason of the suit involving a caste-question. But the Court will not by its decree enable the majority to make a tyrannical use of its power. It will not assist the majority to deprive without cause the minority of their right to use what is the common property of all, or give effect to a resolution passed in violation of the rules of natural justice, or of a directly confiscatory character.³

¹ *Jagannath Churn v. Akali Dossia*, I. L. R., 21 Cal., 463 (1893) [dissenting from *Advocate-General of Bombay v. Haim Devaker*, I. L. R., 11 Bom., 185 (1886), which the learned Judges appear to treat as at variance with their decision. It is, however, to be observed that

the Bombay case was not one relating to a caste but to a Ben-Israelite religious community. See also case cited in next note].

² *Appaya v. Padappa*, I. L. R., 23 Bom., 122, 129 (1898).

³ *Lalji Shamji v. Walji Wardhaman*, I. L. R., 19 Bom., 507 (1895).

(iv) Injunction
between mort-
gagor and
mortgagee.

The rights of parties under a mortgage' being usually fixed and easily ascertainable by reference to its written terms, it is plain that except in cases of fraud or mistake in its inception or execution, or arising out of collateral matters connected with it, or fraudulent attempts to prevent and abuse the powers therein conferred, there is no room for equitable interference. The legal right of a mortgagee in a valid mortgage to have his security preserved until the maturity of the mortgage indebtedness, and afterwards to enforce his claim by strict foreclosure, or by exercising directly or through a designated trustee, his power of sale conferred by the writing will not be interfered with so long as no fraud or unfairness is imputable to him, whatever the resulting loss and hardship to the mortgagor.²

Injunctions pertaining to mortgages may be on behalf of the mortgagor,³ or on behalf of the mortgagee,⁴ or concerning third parties,⁵ or respecting waste of the mortgaged premises.⁶

(a) on behalf
of mortgagor.

Courts of Equity are averse to interference with the legal rights of a mortgagee or with the ordinary remedies for the enforcement of those rights, but will sometimes interfere to restrain proceedings under a sale of mortgaged premises where such proceedings are against conscience and threaten irreparable injury.⁷ As long as anything remains due on the mortgage-security, a mortgagee may pursue all his remedies concurrently, but there may be cases of fraud, or special contract, or other peculiar

² As to the law relating to mortgages, see Act IV of 1882 (Transfer of Property), Ch. IV.

³ Spelling, *op cit.*, § 442. See also High, *Inj.*, Ch. VII; Kerr, *Inj.*, Ch. XVII; Hilliard, *Inj.*, Ch. XXX; Joyce's *Doctrines*, 127;

Joyce's *Inj.*, 189—201.

⁴ High, *Inj.*, § 442.

⁵ *Ib.*, § 462.

⁶ *Ib.*, § 469.

⁷ *Ib.*, § 478.

⁸ *Ib.*, § 442.

circumstances which will deprive a mortgagee of this right. But unless there be fraud, or special contract, a mortgagee will not be restrained from selling under a power of sale.¹ When a mortgage-deed giving the mortgagee a power of sale contains also a proviso that the remedies of the mortgagors, their heirs, administrators and assigns in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be in damages, the Court will not grant an Injunction to restrain the mortgagee from selling the mortgaged property.² In the case of *Rhodes v. Buckland*,³ the Court restrained a mortgagee, pending a suit to redeem, from transferring the legal estate or parting with the deeds. But this case is no authority for the proposition that a mortgagee cannot sell the mortgaged property under the terms of the mortgage-deed during the continuance of a suit for the redemption of the mortgage, and will not warrant the issue of an Injunction restraining such sale on the sole ground that, as a suit for redemption has been filed, matters ought to remain *in statu quo* until the decision of the suit. In that case the Court did restrain the exercise of the power of sale; but the case was a peculiar one, and the person seeking to redeem was not the mortgagor, but a puisne incumbrancer claiming to be entitled to pay off a prior mortgage. As a general rule, when a power of sale has become absolute, the exercise of the power cannot be suspended by the filing of a bill to redeem.⁴ If it could be so suspended, the

¹ Kerr, Inj., 524—525; see Joyce's Doctrines, 127—131.

² *Muncheerji Furdoonji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, 1 L. R., 17 Bom., 711 (1893);

following *Prichard v. Wilson*, 10 Jur., N. S., 330.

³ 16 Beav., 212.

⁴ *Adams v. Scott*, 7 W. R. (Eng.), 213.

mortgagee might be deprived of his remedy and kept out of his money, for an indefinite time. The owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.¹ When a mortgagee has, in pursuance of a power of sale given to him under his instrument of mortgage, served the mortgagor with notice of his intention to exercise this power, the mortgagor is not entitled to file a suit for redemption, and then ask the Court for an Injunction restraining the mortgagee from exercising his power of sale, unless fraud is charged against the mortgagee. To grant such an Injunction would be to cancel one of the clauses of the deed to which both the parties had agreed, and to annul one of the chief securities on which persons advancing money on mortgage rely. It would, of course, be otherwise, if the notice of sale had been given by the mortgagee after the suit for redemption had been filed.

The mortgagor is entitled to have the sale of the property suspended only if he can shew either that he has paid off the mortgage-lien, or that he has made a legal tender of the amount due which has been refused.² And where, upon the authority of the same case and on a rule for an Injunction restraining a sale by mortgagees of mortgaged property, it was argued that as the plaintiffs were willing to redeem and the defendants had refused to accept their offer and threatened to sell, the Court would restrain the sale : it was *held*, that it must be shewn that

¹ *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*, I. L. R., 2 Bom., 252, 254 (1877), *per* Melvill J.

² *Jagjivan Nanabhai v. Shridhar Balkrishna Nagarkar*, I. L. R., 2 Bom., 252, 254 (1877), p. 256, *per* Pinhey, J.

the plaintiffs were willing and able and offered to redeem, as was the case in the decision cited, though not in this rule, that the Court would be very reluctant to interfere with a mortgagee's rights to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time; and that, as it was not shewn that these conditions existed, the rule should upon these facts be discharged.¹

Secondly, Injunctions may be granted on behalf of mortgagees: as on behalf of puisne mortgagees for the purpose of protecting their rights in the mortgaged premises and for the preservation and security of their lien; or as between mortgagees and judgment-creditors for the protection of the former; or against the mortgagor. So the rule is well established that inadequacy of the mortgaged premises as a security coupled with insolvency of the mortgagor will warrant the appointment of a receiver over the mortgaged property, and an Injunction restraining the mortgagor from any interference with such receiver or with the property. And so upon principles analogous to those restraining waste by a mortgagor in possession in cases of real estate, a mortgagor of chattels may be restrained from removing the property beyond the reach of the mortgagee, or from placing it where it will not be forthcoming for the satisfaction of the debt.² The mortgagee of an equity of redemption may obtain an Injunction restraining the mortgagee or other person in possession of the legal estate from paying to the mortgagor the surplus rents or monies which remain after the satisfaction of his own claim.³ And an equitable

¹ *Muncherji Furdooji Mehta v. Noor Mahomedbhoy Jairajbhoy Pirbhoy*, I. L. R., 17 Bom., 711, 716 717 (1893).

² High, Inj., §§ 462—468.
³ *Berney v. Sewell*, 1 J. & W., 647
Parker v. Calcraft, 6 Mad., 11.

mortgagee by deposit of title-deeds may obtain an Injunction for protection of his security.¹

(c) third parties.

Thirdly, the Injunction may concern the rights of third parties.² So on a bill by a judgment-creditor of a mortgagor, the Court granted an Injunction to restrain the mortgagees who were about to sell under their power, from paying the surplus to the mortgagor.³

In the case cited below,⁴ *A* mortgaged land to *B* as either agent or benamidar for *C*. *B* sued on the mortgage and obtained a decree. *C* then sued *A* and *B* for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an Injunction restraining *A* from paying the money to *B*, and *B* from receiving the money from him. It was held that the plaintiff was entitled to the declaration, but not to the Injunction.⁵

(d) waste.

Lastly, the Court has a clear jurisdiction to restrain the commission of waste by the mortgagor in possession, and the jurisdiction is exercised for the purpose of preventing such acts as would depreciate the value of the premises and render the security insufficient. The only difficulty hitherto has been in discovering what is meant by a sufficient security: and it would seem that the question which must be tried is, whether the property the mortgagee took as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act complained of is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the

¹ *Whitbread v. Jordan*, 1 Y. & C., 303; *Meuz v. Bell*, 7 Jur., 821.

² *High, Inj.*, §§ 469—477.

³ *Thornton v. Finch*, 4 Giff., 515; *Joyce's Inj.*, 199.

⁴ *Sethurayar v. Shanmugam Pillai*, I. L. R., 21 Mad., 353 (1897).

⁵ On the ground that the Injunction was excluded by s. 56, cl. (b) of the Specific Relief Act. See *ib.*, p. 336.

time that it was entered into.¹ In this country a security is insufficient unless the value of the mortgaged property exceeds by one-third or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.² Similarly a mortgagee-in-fee may be restrained from committing waste, and will be restrained from cutting timber, unless the security is defective.³

The Transfer of Property Act (1882) deals with the subject of leases,⁴ other than those for agricultural purposes.^{(v) Injunction between lessor and lessee.} It defines the rights and liabilities of lessors and lessees respectively in the absence of a contract or local usage to the contrary.⁶ As a general rule, the relation of the parties is determined by the instrument of lease. The preventive jurisdiction of equity is freely exercised for the prevention of the violation of negative or restrictive covenants annexed to leases, thus in effect enforcing against the tenant a specific performance of the contract for the benefit of the lessor. Relief by Injunction may also be invoked for the protection of the rights of the tenant. The principles upon which relief by Injunction is given in such cases have been dealt with in the preceding pages of this Chapter, and it is not necessary to state again principles which, being of general application, apply as much to contracts annexed to leases as to all other contracts. Frequent instances of the exercise of injunctive jurisdiction in tort may be found in the case of the issue of Injunctions for the prevention of waste by the tenant, which will be found fully dealt with hereafter in

¹ Joyce's Doctrines, 130; High, Inj., §§ 478—483.

² Act IV of 1882, s. 66.

³ Joyce's Doctrines, 130. See generally as to Injunctions in respect of mortgages, *ib.*, 127—131; High, Inj., Ch. VII; Kerr, Inj., Ch. XVII; Spelling's Extraordinary

Relief, 363 *et seq*; Hilliard, Inj., 673—694; Joyce's Inj., 189—201. As to waste by mortgagees, see Act IV of 1882, s. 76 (c).

⁴ Act IV of 1882, Ch. V.

⁵ *ib.*, s. 117; as to these latter leases *v. post*, Ch. IX.

⁶ *ib.*, s. 108.

Chapter IX. Courts of Equity have shown a marked reluctance to interfere by Injunction with legal proceedings instituted by a landlord for the eviction of the tenant in conformity with the accustomed procedure for such purpose in the absence of any elements of fraud or other special equities warranting relief.¹ A suit by a lessor for an Injunction restraining the lessees from interfering with the plaintiffs' right reserved by the lease to enter upon the land demised and cut and take away certain trees was held to be governed by Art. 120 of the Limitation Act.²

Injunctions in cases of trust or other fiduciary relation.

§ 62. Under this important head of equity jurisdiction may be considered firstly, Injunctions against trustees generally, whether holding upon express, implied or constructive trusts. Specific mention is also made under this head of voluntary settlements, confidential communications, trade-secrets, and Injunctions against the publication of letters, lectures or other unpublished matter and trusts attaching to articles in the custody of agents; secondly, Injunctions against executors; and, lastly, Injunctions against corporations, in which the jurisdiction rests upon trust, will be considered.

(i) Injunctions against trustees.

Where the defendant is trustee of property for the plaintiff and invades or threatens to invade the plaintiff's right to, or enjoyment of, the property, the Court may grant an Injunction.³ The prohibition which exists against the grant of an Injunction, when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, does not apply to cases of breach of trust.⁴ The jurisdiction to grant an Injunction in cases of trust is peculiar in this, that such jurisdiction, whether in England⁵

¹ High, Inj., s. 432. See further as to the rights of landlord and tenant, Ch. IX, *post*.

² *Wazir v. Babu Lal*, I. L. R., 26 All., 391 (1904)

³ Act 1 of 1877, s. 54.

⁴ *Ib.*, s. 56, cl. (i) See Joyce's Doctrines, 45.

⁵ Kerr, Inj., 518; Joyce's Doctrines, 45.

or this country,¹ rests not upon the irremediable nature of the mischief, but upon the breach of trust. In all cases of breach of trust, the plaintiff may have an Injunction irrespective of the question of damage.² In cases other than breach of trust, it must be shown either that there is no standard for ascertaining the damage, or that pecuniary compensation is not an adequate remedy, or cannot be got, or that an Injunction is necessary to prevent a multiplicity of proceedings.³ When obligations arise from contract, the Court is to be guided by the rules relating to Specific Performance.⁴ The cases in which contracts may be specifically enforced are the same as those in which an Injunction may be granted, with this exception that in cases of tort the danger of multiplicity of proceedings is an additional ground for injunctive relief.⁵ Specific performance may be decreed when the act agreed to be done is in the performance, wholly or partly, of a trust.⁶ The word 'trust' includes every species of express, implied, or constructive fiduciary ownership.⁷ An Injunction may be granted where the defendant is trustee of the property for the plaintiff.⁸ The word 'trustee' includes every person holding, expressly, by implication, or constructively a fiduciary character.⁹

¹ Act I of 1877, ss. 54, 12.

² *Ib.*, s. 54, Ill. (f).

³ *Ib.*, s. 54.

⁴ *Ib.*

⁵ *Ib.*, ss. 12, 54.

⁶ *Ib.*, s. 12, cl. (a) [As to the distinction between specific performance strictly so called and the enforcement of trusts, see Fry's Specific Performance, §§ 38, 40; Nelson, 118.]

⁷ *Ib.*, s. 3. An 'express' trust is a trust which is clearly expressed by the author thereof whether verbally or by writing. An 'implied' trust

is a trust which is founded on an unexpressed, but presumed *i. e.*, implied intention of the party creating it. [See s. 3, Ill. (a).] A 'constructive' trust is a trust which is raised by construction of equity, without reference to any intention of the parties, either express or presumed, and although there should be no such intention of the parties at all. [See s. 3, Ills. (b)–(h).] Snell's Equity, v. *ante*.

⁸ *Ib.*, s. 54, cl. (a).

⁹ *Ib.*, s. 3.

An Injunction may, therefore, be granted against the breach of any trust, whether that trust be express or implied or of a constructive character only.¹ Private trusts, that is, trusts whose object or purpose is not of a public or charitable nature, are now, in the territories to which the Act extends,² regulated by the Indian Trusts Act, 1882, the third section of which defines a 'breach of trust' as 'a breach of any *duty* imposed on a trustee, as such, by any law for the time being in force.' Chapter III of that Act sets forth the duties and Chapter IV treats of the powers of trustees, whilst the Specific Relief Act enacts³ that contracts made by trustees in breach of the former, or in excess of the latter, cannot be specifically enforced and, therefore, no Injunction can be granted to prevent the breach of such a contract.⁴

✓ The issue of Injunctions in matters of trust is an important branch of equity jurisdiction. A trustee may not use the powers which the trust confers on him at law, except for the legitimate purposes of the trust. If he attempt to do so, the Court will restrain him by Injunction from making a wanton exercise of his legal powers.⁵ In the exercise of its powers to enforce the proper performance of their duties, the Court may enjoin trustees from proceeding in disregard of the conditions necessary to the proper exercise of their authority or from an improper use of such authority. The rights of the *cestui que trust* will be protected by restraining the trustee from doing any act inimical to his duty as such. So an Injunction will be granted when necessary to prevent a trustee encumbering the trust-property by mortgage,

¹ See Spelling's Extraordinary Relief, §§ 561—570.

² v. *ante*, p. 217.

³ Act I of 1877, s. 21, cl. (c).

⁴ *Ib.*, s. 56, cl. (f).

⁵ Kerr. Inj., 518.

conveyance, or contract, or in any other manner which would constitute a breach of the trust. Equity will not, however, confine its protecting powers to the party having the beneficial interest, but will, in a proper case, grant an Injunction in favour of the trustee to restrain his *cestui que trust*¹ or co-trustee.² It is a principle of a Court of Equity that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of the trust; and the Court will restrain him from doing so, and that although the plaintiff may have a remedy at law;³ and while time affords no sanction to establish breaches of trust, the Court will restrain the commission of acts in violation thereof.⁴

✓ So it has been the invariable practice when any act involving breach of trust is intended to be done, though not in its consequences irremediable, to restrain such act. So if *A*, a trustee for *B*, is about to make an imprudent sale of a small part of the trust-property, *B* may sue for an Injunction to restrain the sale, even though compensation in money would have afforded him adequate relief;⁵ and if *A*, a trustee, threatens a breach of trust, his co-trustees, if any, should, and the beneficial owners may, sue for an Injunction to prevent the breach.⁶ It would not be relevant to the present enquiry, nor possible without a review of the general law relating to trusts, to mention all the instances in which the Courts have interfered or may interfere in matters of trust. Illustrations (b) to (i) to section 54 of the Specific Relief

¹ Spelling, *op. cit.*, § 357.

² Act I of 1877, s. 54, Ill. (b); Kerr, *Inj.*, 519.

Joyce's Doctrines, 45; *Balls v. Strutt*, 1 Hare, 146; Act I of 1877, s. 56, cl. (i); *Ranga Pai v. Baba*,

I. L. R., 20 Mad., 403 (1897).

³ Joyce's Doctrines, 45.

⁴ Act I of 1877, s. 54, Ill. (j). (See Joyce's Doctrines, 45.)

⁵ *Ib.*, Ill. (b).

Act are all examples of the class of cases where an Injunction is sought to enforce an obligation arising out of some fiduciary relation.¹ Illustrations (b) and (f) have been already cited. In Illustrations (c) and (d), the directors stand in a fiduciary relation towards the shareholders. The case of an executor dealt with by Illustration (e) approaches that of a trustee and is hereinafter separately dealt with. Illustration (g) referring to voluntary settlements "is the complement to section 24, clause (d), and section 25, clause (c), and Illustration (d). These show that neither a purchaser with notice of a prior voluntary settlement, nor a vendor who has made a prior voluntary settlement, can enforce specific performance of the contract; that is, in each case the other party to the subsequent contract may avail himself of the fact of the prior voluntary settlement as a defence to a suit for specific performance of the contract. Here, in Illustration (g), we have the case put of one interested under a prior voluntary settlement, actively interposing as against the settlor, to restrain a subsequent contract of sale, though we should also note that the Injunction does not operate here indirectly as a specific performance of the settlement, but only to prevent an extraneous act in violation of it. As against the intending purchaser, the proper course is to give him notice of the prior settlement. It is only a settlement of which there might be specific performance under section 12, clause (a), that is entitled to the indirect protection of an Injunction as suggested by Illustration (g)."² Illustrations (h) and (i), which are similar cases, refer to the equitable jurisdiction to correct abuse of confidence and to restrain by Injunction the publication of confidential communications,

¹ Collett's Specific Relief Act, 290.

² *Ib.*, 295, 296.

papers and secrets. In all cases where a confidential relationship can be shown to exist, the Court fastens an obligation on the conscience of the party who has derived any confidential communication through that relationship, and will enforce it against him in the same manner as it enforces against a party, to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred.¹ Upon this principle persons to whom such confidential communications have been made, and persons into whose possession, or to whose knowledge documents have come in the course of their employment, whether as legal or medical advisers, agents, assistants, clerks and the like, will be restrained by Injunction from making them public or communicating their contents to a stranger in breach of the trust and confidence reposed in them.² In the case of solicitors, a distinction has been drawn between cases where the solicitor voluntarily makes a communication of what has come to his knowledge in the course of his professional employment, and cases where he is required to disclose what he knows by giving evidence in Court. In the one case the Court will,³ and in the other case it will not⁴ interfere by Injunction, the propriety of his being examined being left to the

¹ *Morison v. Moat*, 9 Ha., 255.

² Kerr, Inj., 486; Joyce's Doctrines, 139, 224. The protection does not, of course, extend to cases where a fraudulent transaction has come to the knowledge of a person in the course of his employment, since "an employer can have no property in iniquitous secrets." *Gartside v. Outram*, 3 Jur., N. S., 40.

³ *Lewis v. Smith*, 1 Mac. & G., 417.

⁴ *Beer v. Ward, Jacobs*, 77. As to the privilege relating to profes-

sional communications, see the Indian Evidence Act (I of 1872), ss. 126—129. Ameer Ali and Woodroffe's Law of Evidence, 3rd. Ed. The law relating to professional communications between solicitor and client, is (with the exception of the substitution of 'illegal' for 'criminal' purpose in s. 126) the same in India as in England. *Framji Bhicaji v. Mahansing Dhansing*, I. L. R., 18 Bom., 263 (1903).

consideration of the Court before which he is to appear as a witness. With a further view to the protection of a client from the disclosure of confidential communications, the Court will not permit a solicitor who has been employed by one party to a suit to act for another party to the same suit, either in that suit or in a transaction which flows out of it and is clearly connected with it against his former client.¹

Similarly if a person who has a trade-secret employs others under a contract either express or implied, or under a duty, express or implied, those others may be restrained by Injunctions from disclosing the secret.²

Analogous cases may be found in the rules regulating the issue of Injunctions against the publication of letters³ and other unpublished matter. The receiver of a letter has the right to the possession of it, but he has no right, subject to certain recognised qualifications, to publish it without the consent of the writer. On the other hand as the right to publish belongs to the writer, the receiver cannot prevent its publication. Should the receiver threaten to publish the letter, he may be restrained by Injunction from so doing,⁴ and the Court may order the letter to be destroyed.⁵

¹ *Little v. Kingswood Collieries Co.*, 20 Ch. D., 733. This principle does not extend to questions arising under the practice of retainer of counsel. *Baylis v. Grout*, 2 M. & K., 317. See generally Kerr, *Inj.*, 489, 491.

² Act I of 1877, s. 54, Ill. (z); Kerr, *Inj.*, 491, 492; Joyce's Doctrines, 224, 225; Spelling, *op. cit.*, 568; *Merryweather v. Moore* (1892), 2 Ch., 518.

³ It has, however, been said that

the Court interferes to protect the vendor's right of property and not because letters are written in confidence; *Gee v. Pritchard*, 2 Swanst., 426; but see also Kerr, *Inj.*, 498, 494; Spelling, *op. cit.*, § 567.

⁴ Act I of 1877, s. 54, Ill. (y).

⁵ *Ib.*, s. 55, Ill. (d); see generally Kerr, *Inj.*, 498—501. The application for an Injunction should be made without delay before defendant has incurred expense: *ib.*, 500.

Similarly the publication of lectures may be restrained, when such publication is a violation of trust or confidence.¹ In the case of other unpublished manuscripts, drawings and the like, the author and composer has an absolute property in his work before publication. He may prevent publication. He has a right to the first publication, and whoever deprives him of that privilege is guilty of a wrong which the Court will endeavour to restrain. In restraining by Injunction the publication of a manuscript or other unpublished matter, the Court exercises an original and independent jurisdiction not for the protection of a merely legal right, but to prevent what in equity the Court considers and treats as a wrong, whether arising from a violation of an unquestionable right or from a breach of contract or confidence.² The exclusive right of the author or composer ceases upon publication. After publication the right exists only by Statute under the name of copyright, and the jurisdiction by interlocutory Injunction against the violation of copyright, is in aid of the legal right, and is founded upon the necessity of protecting the property from irreparable damage pending the trial of the right.³

Equity will, when there is a duty incumbent upon one occupying an ordinary relation as that of agent, to deliver a thing *in specie*, attach a trust to the article to compel such delivery, and enjoin its transfer to another person than its owner.⁴

With regard to the parties who should sue for an Injunction in cases of breach of trust, either the benefi-

Caird v. Sime, 12 App. Ca., 326.

¹ *Prince Albert v. Strange*, 1 Mac. & G., 42. See as to this *Merryweather v. Moore* (1892), 2 Ch., 522; and generally as to Injunctions in these cases: Kerr, *Inj.*, 493—498.

² See *post*, Ch. XI.

³ *Spelling, op. cit.*, § 563; *Somer-set v. Cookson*, 3 P. Wms., 389; *Arundel v. Phillips*, 10 Ves., 139; *Nuthrown v. Thornton*, 10 Ves., 163; *Fills v. Read*, 3 Ves., 163.

cial owners or the co-trustees may so sue.¹ Where a person has a common interest with others in a trust-fund or trust-estate, he may sue on behalf of himself and the others for the protection of the property by Injunction.² With regard to suits against companies and corporations see §§ 62 (ii), 63 (iii). In the case of the alleged breach of any express or constructive trusts created for public, charitable or religious purposes, the Advocate-General or two or more persons having an interest in the trust with his consent may sue in respect of such breach of trust.³ Though the protection and proper administration of trusts is a matter of great importance, great care should be exercised in the granting of interlocutory Injunctions against trustees, lest by tying their hands the trust-estate may be left without a representative. The trustee should not be divested of his trust, until he has had an opportunity of answering, except in a case of pressing necessity and imminent probability of great danger and detriment from delay. The charges should be specific and the writ will not be awarded in the first instance upon mere general charges of abuse and violation of trust.⁴

No suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property is barred by any length of time.⁵ But a suit by trustees against their co-trustees praying for an Injunction to restrain the defendants from

¹ Act I of 1877, s. 54, Ill. (b); *Vaman v. Municipality of Sholapur*, I. L. R., 22 Bom., 652 (1897); as to co-trustees, see *Ranga Pai v. Baba*, I. L. R., 20 Mad., 403 (1897).

² *Kerr, Inj.*, 519: see *Civ. Pro. Code*, s. 30.

³ *Civ. Pro. Code*, s. 539. As to

private endowments, see *Broj-mohun Doss v. Hurroall Doss*, I. L. R., 5 Cal., 700 (1880).

⁴ *Spelling's Extraordinary Relief*, § 558.

⁵ Act XV of 1877 (Limitation), s. 10, see cases cited in *Mitra's Limitation Act*, 3rd Ed., 589—596.

excluding them from management is not within the operation of the last mentioned section.¹

Much of the former jurisdiction of equity to control by Injunction and other equitable remedies is now exercisable by the Court of Probate Jurisdiction. The Probate Division in common with the other Divisions of the High Court in England has power to grant Injunctions, and to appoint Receivers under and by virtue of the Judicature Act. And though other Divisions of the Court may also have powers in respect of a deceased's estate, yet applications which are properly made in the Probate Division will not, if made elsewhere, be encouraged.² In this country in which the same Courts exercise concurrently, the ordinary Civil and Testamentary and Intestate Jurisdictions, the power to grant Injunctions in these matters is, as is now the case in England, based upon Statute. The equitable jurisdiction to interfere by Injunction is referable to the trust-relation which, notwithstanding the increase of legislation on the subject, executors and administrators still hold to all parties interested in the estates entrusted to them.³ Persons entitled to relief by Injunction against executors and administrators are those directly entitled to the beneficial interest, either as heirs or devisees, in the estate in the actual charge of executors or administrators, or persons less directly interested as being creditors of the deceased's estate. The Court will restrain all breaches and abuses of trust with regard to the disposition of the assets. So if an executor, through misconduct or insolvency, is bringing the property of the deceased into danger, the Court may grant an Injunction to restrain him from

(ii) Injunctions
against execu-
tors and
administra-
tors.

¹ *Ranga Pai v. Baba*, I. L. R., 20 §§ 571, 585; Williams on Executors Mad., 398 (1897). 9th Ed., pp. 187, 433, 1953.

² Spelling's Extraordinary Relief.

³ Spelling, *op. cit.*, § 572.

getting in the assets,¹ and will otherwise interfere for the protection of the estate. The Court will not restrain an executor from parting with the assets, unless a case of past or probable misapplication of them has been made out.² Creditors will not, as a general rule, be entitled to an Injunction except in the case of waste or mismanagement whereby payment of the indebtedness to them is imperilled. And an Injunction is properly granted against executors, who refuse to distribute the estate rateably among the creditors and in accordance with the terms of the devise and are threatening to secure certain favoured creditors not entitled to preference.³ There is nothing to prevent several creditors or legatees severally instituting actions for administration; but, as a general rule, a stay of proceedings will be directed when a decree for administration has been made in any of such actions, inasmuch as such decree is for the benefit of all creditors who may all come in under it and receive payment of their debts in due course of administration.⁴ If *A* in an administration-suit, to which a creditor *B* is not a party, obtains a decree for the administration of *C*'s assets, and if *B* proceeds against *C*'s estate for his debt, *A* may sue for an Injunction to restrain *B*.⁵ The jurisdiction is not confined to those entitled to the beneficial interest in the trust fund in charge of executors and administrators, but will in

¹ Act I of 1877, s. 54, Ill. (e) Kerr, Inj., 508.

² Kerr, Inj., 509.

³ *Elam v. Elam*, 72 Ga., 162 (Amer.); *Depau v. Moses*, 3 Johns., Ch., 349 (Amer.) cited in Spelling, *op. cit.*, p. 465.

⁴ Williams on Executors, 1802, 1908; Spelling *op. cit.*, § 582; *Soobul Chunder Law v. Russick Lall Miller*,

I. L. R., 15 Cal., 202 (1886).

⁵ Act I of 1877, s. 54, Ill. (g); *Lutcheemund Sett v. S. M. Kamumoney Dossee*, 1 Ind. Jur. N. S., 9 (1866). In the last mentioned case, it was held that the application was properly entitled in the original proceeding in which the order for administration had been made.

proper cases be administered in their favour. Relief is as freely granted in favour of, as against executors and administrators, where necessary for their protection in administering the estate.¹ So an Injunction has been granted before probate on the application of a person appointed executor to restrain another person appointed co-executor from intermeddling with the estate and improperly dealing with it before probate.²

In all suits concerning property vested in a trustee, executor or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator, shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.³ When there are several executors or administrators, they shall all be made parties to a suit against one or more of them: Provided that executors who have not proved their testator's will, and executors and administrators beyond the local limits of the jurisdiction of the Court, need not be made parties.⁴ Unless the Court directs otherwise the husband of a married administratrix or executrix, shall not be a party to a suit by or against her.⁵

The jurisdiction of the Court to interfere by Injunction against the acts of public corporations of whatever nature is based upon the relation of trust. A corporation, like an individual, may dispose of its property, and the Court will not interfere, unless a trust and a breach of

(iii) Injunctions against corporations

¹ Spelling, *op. cit.*, 573.

² In the *goods of Moore*, 13 P. D., 36; see *Williams op. cit.*, 1943 as to the executor's right to an Injunction, see *Williams, op. cit.*, 1799 and *cf.*

Act I of 1877, s. 54, III. (g).

³ Civ. Pr. Code, s. 437.

⁴ *Ib.*, s. 438.

⁵ *Ib.*, s. 439.

that trust is established. If corporate property be affected by a trust, the power and jurisdiction of the Court to enforce and execute the trust attaches equally as it does upon other property.¹ Public functionaries or bodies incorporated by Statute for a particular purpose or the promotion of a public benefit, may not exceed the jurisdiction, which has been entrusted to them by the Legislature. So long as they strictly confine themselves within the limits of their jurisdiction, and proceed in the mode which the Legislature has pointed out, the Court will not interfere to see whether any regulation or alteration, which they make, is good or bad ; but if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority and assume to themselves a power which the law does not give them, the Court no longer considers them as acting under the authority of their commission, but treats them as persons acting without legal authority.²

Where a public body has received by statute a discretionary power and is laid under an obligation to do a particular thing, such as to levy and collect a rate, an Injunction cannot be granted by a Court so as to deprive such public body of the power of exercising its discretion or to prohibit it from discharging the obligation.³ In the case of corporations for charitable purposes such as hospitals, free schools and the like, the Court has no jurisdiction to interfere with the visitorial power unless it finds a breach of trust ; but where there is a breach of

¹ Kerr, Inj., 566; High, Inj., Chs. XXI, XXII Spelling's Extraordinary Relief, Ch. XVI. See also Cluck and Becker's Receivers of Corporation, 2nd Ed. and Joyce's Inj., p. 718 (Corporations and Quasi-Corporations).

² *Prewin v. Lewis*, 4 My. & Cr.,

249, 254; 9 Sim., 66; Joyce's Principles, 24, 25; Kerr, Inj., 568; see High, Inj., § 1308, *et seq.*, as to Injunctions against public officers.

³ *The Municipal Commissioners for the Town of Madras v. Branson*, I. L. R., 3 Mad., 201 (1881). See Joyce's Inj., 730.

trust the Court will interfere to see the trusts properly performed notwithstanding that there may be a general or special visitor.¹ A municipal corporation is considered to hold a similar relation to the citizens and tax-payers within its boundaries as that held by a private corporation to its members; that is, it occupies the relation of a trustee. As agents and trustees, those for the time occupying municipal offices may be called to account in equity by various actions and restrained by Injunction from all breaches of trust and abuses of power.² In the case cited below³ the Court observed as follows:—"There can, I think, be no doubt that if the Port Trustees or any other corporation or public company in Bombay were to do or attempt to do any act in excess of their powers, as contained in the Charter or Legislative Act from which they derive their being, and such acts would be injurious to the rights of property of an individual, such individual would, on general principles, have a right to the protection of this Court by Injunction or other appropriate relief." So a suit will lie at the instance of individual tax-payers for an Injunction restraining a municipality from misapplying its funds,⁴

¹ Kerr, *Inj.*, 572 as to municipal corporations see *ib.*, 567, Joyce's *Inj.*, 718 and *post*; spiritual or ecclesiastical corporations, Kerr, *Inj.*, 573; quasi corporations aggregate, Joyce's *Principles*, 299; quasi corporations sole; Joyce's *Inj.*, 753; and as to clubs, societies and castes.

² Spelling's *Extraordinary Relief*, § 676; High, *Inj.*, § 1236. See *New London v. Brainard*, 22 Conn., 552-6 (*Amer.*), cited in Joyce's *Inj.*, 731. Municipal Acts frequently expressly declare that municipal funds are to be held and applied by the municipi-

palities as trustees. See *Vaman v. Municipality of Sholapur*, I. L. R., 22 Bom., 652 (1897). A municipal corporation is bound by the acts of its officers. *Tullaram v. Corporation of Calcutta*, 7 C. W. N., 329 (1903).

³ *Shepherd v. The Trustees of the Port of Bombay*, I. L. R., 1 Bom., 132, 142 cited with approval in *Vaman v. Municipality of Sholapur*, I. L. R., 22 Bom., 651 (1897).

⁴ *Vaman v. Municipality of Sholapur*, I. L. R., 22 Bom., 646 (1897); as to the misapplication of corporate funds, see Kerr, *Inj.*, 569-571.

as also to restrain by Injunction a municipality from levying an illegal tax.¹

But an injunction will not be granted when equally efficacious relief can be otherwise obtained. So in the undermentioned case² the Surat City Municipality served, under section 82 clause (3), of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house-tax due by him. The plaintiff instead of proceeding under section 86 of the Act instituted a suit in the Civil Court for an Injunction to restrain the Municipality from recovering the house-tax from him. The lower Courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature. *Held*, that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But *held*, also (confirming the decree), that the Injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an Injunction cannot be granted, where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of

¹ *The Surat City Municipality v. Ochhavaram Jamnadas*, I. L. R., 21 Bom., 630, 635 (1896); in this case the injunction which had been granted by the first Court was dissolved and the suit dismissed upon the ground only that the tax was legally imposed. In the earlier case of *Hormasji Karsetji v. W. G. Pedder*, 12 Bom. H. C. R., 199 (1875), the Court appears to have doubted whether the Court ought to interfere by way of Injunction with the exercise of a right or alleged right of officers of a municipal body to

levy taxes and dues. It is, however, submitted that Injunction is the proper remedy to prevent the collection of an illegal tax (see Spelling's Extraordinary Relief, § 644, and Ch. XV *passim*, where the subject of Injunctions pertaining to taxation is fully dealt with)—at any rate where there are special circumstances attending the threatened injury to distinguish it from a mere trespass. High. Inj., § 485.

² *Chunilal v. Surat City Municipality*, I. L. R., 27 Bom., 403 (1903).

Bombay Act (III of 1901) gave a remedy to the plaintiff but instead of resorting to it he filed this suit for Injunction. It was discretionary for a Court to grant an Injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind.

A contract made by, or on behalf of, a corporation, or public company created for special purposes which is in excess of its powers cannot be specifically enforced, and therefore no Injunction can be issued in respect of the breach of such a contract.¹

With regard to the parties in an action against a corporation, the English rule is that, if there is a trust for public purposes, or the act complained of affects the revenues of the corporation, the suit should be instituted by the Attorney-General at the instance of a relator or, if he declines to interfere, a certain number may file a bill on behalf of themselves and others making the Attorney-General defendant. If the trust be of a private nature the Attorney-General should not be a party.² In the case of public charities the Code of Civil Procedure provides for a suit at the instance of the Advocate-General or two or more persons interested in the trust, who have obtained his consent.³ In other cases, where there are numerous parties, one party may sue or defend on behalf of all in the same interest.⁴ It has further been held that as an individual share-holder or policy-holder may sue a company in the funds of which he is interested, an individual rate-payer, though his personal interest may be small but not less real, may sue a municipal corporation to the funds of which he contributes and in the proper application of which he

¹ Act I of 1877, s. 21, cl. (f).

² Kerr, Inj., 567.

³ Civ. Pr. Code, s. 539.

⁴ *Ib.*, s. 30.

is necessarily interested.¹ An Injunction directed to a corporation or public company is binding not only on the corporation or company itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.²

It has been held that delay in making an application to restrain a corporation from applying the corporate funds to other purposes than the proper purposes of the Act is not material.³

¹ *Vaman v. Municipality of Sholapur*, I. L. R., 22 Bom., 646 (1897), in which the plaintiff's suit was held not to fall within the prohibition of clause (k) of s. 56 of the Specific Re-

lief Act.

² Civ. Pr. Code, s. 493.

³ *Attorney-General v. Eastlake*, 11 Ha., 228; *Attorney-General v. Mayor, &c., of Plymouth*, 1 W. R., (1845), 445.

CHAPTER VII.

INJUNCTIONS IN CASES OF TORT.

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| § 63. TORTS. | (b) Injunction. |
| § 64. WHO MAY SUE AND BE SUED
IN RESPECT OF TORTS. | § 66. PRINCIPLES UPON WHICH AN
INJUNCTION WILL BE GRANT-
ED IN CASES OF TORT. |
| § 65. REMEDIES IN CASE OF TORT:
(a) Damages. | |

§ 63. So far, the meaning of an Injunction as a form of relief, the principles upon which, and the practice according to which, it will be granted, together with the issue of Injunctions in the case of judicial proceedings, contract, transfer of property and trust, have been dealt with. There now remains for consideration only the question of the grant of this relief in cases of tort. It is not proposed, and it would indeed be beyond the scope of this work, to deal in detail with the substantive law of torts or (which would in effect amount to the same thing) to enumerate every particular instance in which an Injunction has been, or may be, granted in respect of the threatened commission of a tort. In India the general principles governing the grant of this form of relief whether arising in contract or tort have been codified by the Specific Relief Act. Whilst a correct apprehension of these principles is of the first importance, the cases to be found in the books under the various heads of tort are for the most part mere applications of those principles to the various circumstances which are the subject-matter of the general law of torts. The Chapters of this work, therefore, treating of Injunctions in

Torts.

cases of contract and tort do not purport to deal with all the instances in which an Injunction has been, or may be, granted against a threatened breach of contract or commission of tort. Such a treatment of the subject-matter would in fact, involve a complete discussion both of the law of contract and tort together with a mere repetition of the fact that injunctive relief is available wherever there is a threatened breach of an obligation imposed by that law. All that is really necessary is to ascertain first, whether under the substantive law relating to contract and tort there is an obligation, the breach of which is threatened: secondly, whether the general principles regulating the grant of Injunctive relief permit of such remedy under the particular circumstances of the case. Such instances as are given of cases in which an Injunction has been, or may be, issued are so given as illustrations merely of the practical working of those general principles which are the real subject-matter of this work.

There is no codified substantive law of torts in India.¹ Such law must, therefore, sought for in the English, and Indian case law and text-books.²

The position of the law of torts in the field of jurisprudence has been described as follows:—The members of a political society necessarily impinge upon the

¹ In 1886 Sir Frederick Pollock completed a draft of a Civil Wrongs Bill for the Government of India which in certain places departs from the Existing English law and which will be found at p. 536 of his fourth edition of the Law of Torts. The draft however, was not proceeded with.

² See as to the general Law of Torts, Pollock on Torts, 4th ed. (1895); Clerk and Lindell's Law of Torts,

2nd ed. (1896); Ball's Leading Cases on the Law of Torts; Innes' Principles of the Law of Torts (1891); Underhill's Law of Torts, 6th ed. (1894); Bigelow's Elements of the Law of Torts; Alexander's Indian Case-law on Torts, 3rd ed. (1891); Collett's Manual of the Law of Torts, 7th ed. (1895); Text-books dealing with specific branches of the law of torts are mentioned in succeeding pages.

free action of each other. The law determines what amount of freedom of action each member may exercise. The rights of each within the limits so determined to the unfettered enjoyment of the benefits of social life, so far as they are enforceable by the State, are called his legal rights, and every other person in the community is under a legal duty to respect those rights by so ordering his conduct as to abstain from causing a violation of them. Every legal duty towards a person pre-supposes in him a privilege to invoke the law (1) to protect him against any breach of the legal duty; or if the legal duty be violated, (2) to cause restitution to be made or compensation to be given to him.

A tort or injury is a violation of present right. The right involved in a tort is distinguished from that in a contract by its being in actual enjoyment at the time of the commission of the tort, while that of a contract is the right to the fulfilment of a promise made by some person. Further, contractual rights are rights against determinate or known persons, while those with which torts are concerned are styled rights as against indeterminate persons, because it cannot be known beforehand who will violate them. It is a right *in rem*, whilst rights, arising out of contract, transfer of property or trust dealt with in Chapter VI, are rights *in personam* or rights of that nature.

Both rights may be violated, but in the case of a contract the violation is and must be by the other party to the contract, while in the case of a tort it may be by any member of the community or class of the community. The law of torts forms a portion of private law which is concerned with questions as between man and man as distinguished from public law which is concerned with questions (1) between individuals and the community as

in criminal law, or (2) between the community and another community as in public international law. Law again, whether public or private, consists of two portions, one of which, called substantive law, deals with rights and the other called adjective law, with the methods by which substantive law is administered.¹ Injunctions have only a place in private law. The law of torts forms a part of the substantive portion of private law. The law relating to Injunctions forms a part of the adjective portion of private law or the law of procedure.

A tort has been theoretically defined to be the unauthorized prejudicial interference of some person by act or omission with a right *in rem* of another person; and the conduct which brings about the prejudicial interference is said to be tortious.² Considered more practically and from the point of view of English jurisprudence, a tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Courts, to a civil remedy, which is not an action of contract.³ It is commonly said to be an actionable wrong independent of contract.

Torts may constitute: (1) *personal wrongs*, viz., (a) wrongs affecting the safety and freedom of the person, such as assault, false imprisonment and the like; (b) wrongs affecting personal relations in the family, such as seduction, enticing away of servants; (c) wrongs affecting reputation, such as slander and libel; (d) wrongs affecting estate generally, such as deceit, slander of title, malicious prosecution. (2) *Wrongs to property*, viz., (a) trespass, (b) waste, (c) interference with rights analogous to property, such as private franchise, patents, copyrights. (3) *Wrongs to persons, estate and property*

¹ Innes' Principles of the Law of Torts (1891), pp. 1—5.

² *Ib.*, p. 5.

³ Pollock on Tort, p. 4; see also the fuller definition given in Underhill's Law of Torts, 6th ed., p. 5.

generally, such as (a) nuisance, (b) negligence, (c) breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings.¹

§ 64. Generally speaking, every person who has been injured by the commission of a tort may maintain an action therefor.² An Injunction, however, cannot be granted, where the applicant has no personal interest in the matter.³ The question, whether a right of action for a tort is assignable so as to entitle an assignee to sue in his own name, is one which apparently has never been decided, though presumably, when the question arises, it will be held that the general rule is that it cannot be so assigned.⁴ As to the effect produced on liability for a wrong by the death either of the persons wronged or the wrong-doer, the general rule expressed in the form of the maxim "*actio personalis moritur cum persona*" is that the right to sue and the liability to be sued for torts, ceases with the life of either party.⁵ But the rule does not apply where the tort consists of: (1) The appropriation by the defendant of specific property or its proceeds or value belonging to the plaintiff;⁶ (2) an injury committed by the deceased within one year before his death;⁷ (3) or an injury which has occasioned pecuniary

Who may sue
and be sued in
respect of
torts.

¹ Pollock on Torts, p. 7: to the classification there given the tort of waste is added.

² There are some exceptions so an alien enemy can only sue with the permission of the Governor-General. Civ. Pr. Code, s. 430, and a Corporation cannot sue for a tort merely affecting its reputation. *Mayor of Manchester v. Williams*, 1891, 1 Q. B., 94, see Underhill, *op. cit.*, 51, Clerk and Lindsell, *op. cit.*, 34.

³ Act I of 1877, s. 56, cl. (k).

⁴ Clerk and Lindsell, *op. cit.*, 46, 49.

⁵ Underhill, *op. cit.*, 129; Pollock, *op. cit.*, 55. Clerk and Lindsell, *op. cit.*, 41.

⁶ *Phillips v. Homfray*, 24 Ch. D., 439; Pollock, *op. cit.*, 65, 66; Clerk and Lindsell, *op. cit.*, 45, 46.

⁷ Act XII of 1855; *Gokul Chandra v. Basik Begum*, Mar., 244, which ruling as regards an action for defamation is not now law: see Act X of 1865, s. 268; Act V of 1881, s. 89.

loss to the estate of a deceased committed within the same time;' (4) an injury causing the death of the deceased, if he or she leaves a wife, husband, parent or child.⁷ Subsequently, to the passing of the last mentioned Act,⁸ it was enacted by the Succession Act and the Probate and Administration Act⁹ that all demands and rights to prosecute or defend a proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, or other *personal injuries* not causing the death of the party, and except also where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.⁵

As to the persons who may be sued, generally speaking, every person who commits a tort not arising out of the performance of a contract is liable to be sued.⁶ No person can be sued for a tort arising out of the performance of a contract, who would be incapable of entering into that contract.⁷ The Sovereign, however, cannot be sued; but this exemption is personal and does not

¹ *Id.*; *Haridas Ramdas v. Ramdas Mathuradas*, 13 B.M. 677 (1889).

² Act XIII of 1855; see Alexander, *op. cit.*, 273—278, and cases there cited.

³ Act X of 1865, s. 268.

⁴ Act V of 1881, s. 89.

⁵ See as to the effect of death, marriage or insolvency of parties on pending suits, Civ. Pr. Code, Ch. XXI; as to the effect of insolvency, see Underhill, *op. cit.*, 131; Clerk and Lindsell, 36, 37; Civ. Pr. Code, s. 370. A cause of action arising out of a statutory duty to the deceased survives to his executors; *Peebles v. Oswald-twistle Urban District Council*, 2 Q. B.,

(1896), 159.

⁶ The suggested exception of torts depending upon fraud or malice committed by persons mentally incapable of such (Underhill, *op. cit.*, 52 Clerk and Lindsell, 37, 39) is no real exception (Pollock, *op. cit.*, 48.) A corporation is liable to be sued, for a tort of the thing done or committed is within the purpose for which the corporation exists, if not, the person authorising or committing the tort can alone be sued. Underhill, 52, 55, Pollock, 53; Clerk and Lindsell, 49-52.

⁷ *Jennings v. Randall*, 8 T. R., 335; *Burnard v. Haggis*, 14 C. R., N. S., 45; Underhill, 55; Pollock, 49.

extend to public officers of State acting on behalf of the Crown. The agent is responsible even though the act be directly ordered by the Crown. Nor can foreign sovereigns or ambassadors of foreign powers be sued.¹ An Injunction cannot be granted to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government.² When a suit was brought against the Secretary of State for India and others to restrain the defendants by Injunction from taking possessions of the plaintiff's property under colour of a certain award made by the Special Collector and of the provision of the City of Bombay Improvement Act (IV of 1898) it was held that in that suit and in the circumstances of that case no Injunction could be claimed against the Secretary of State and that having regard to s. 424 of the Civil Procedure Code the suit was not maintainable against him in the absence of notice.³ When several persons join in committing a tort, the general rule is that each is responsible for the injury sustained by their common act, the liability of the wrong-doer being, as a general rule, joint and several.⁴ Whoever commits a wrong is liable for it himself. It is no excuse that he was acting as an agent or servant on behalf and for the benefit of another. But that other may well be also liable; and in many cases a person is held answerable for wrongs not committed by himself,⁵ as when

¹ Clerk and Lindsell, 34; *Rogers v. Rajendro Dutt*, 8 M. L. A., 130, 131 (1860).

² Act I of 1877, s. 58, cl. (4).

³ *Hari v. Secretary of State for India*, 1. L. R., 27 Bom., 424, 450 (1903).

⁴ Clerk and Lindsell, 53; *Alexander, op. cit.*, 55, *Ganesh Singh v. Ram*

Raja, 3 B. L. R., P. C., 44 (1869); but see *Krishna Mohun Byack v. Kunjo Behari Byack*, 9 C. L. R., 1 (1881).

⁵ Pollock, 67. So the circumstance that the defendant was acting under orders is no answer to a claim for an Injunction; *Collard v. Marshall* (1892), 1 Ch., 575.

the wrong is committed by Agents, servants or contractors.¹

Remedies in
case of tort.

§ 65. The remedies, available in the case of tort committed or threatened, are compensation for the injury by the grant of damages, and Injunctions to prevent the commission or continuance of the tort.

(a) Damages.

As in cases of breach of contract, the ordinary remedy in case of tort lies in damages. There is no fixed rule for estimating damages in cases of injury to the person.

The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act, and for all natural and necessary expenses incurred by reason of such act. Where any special damages have naturally and in sequence resulted from the tort, they may be recovered but not otherwise, and the damages awarded must include prospective damages or the probable future injury resulting to the plaintiff from the tort. The Court may consider circumstances of aggravation and mitigation. Damages in actions of tort founded upon contract must be estimated in the same way as they are estimated in breach of contract.²

(b) Injunction.

In addition to the remedy by action for damages in respect of torts which have actually been committed, there is, in certain cases, an ancillary remedy by way of Injunction to prevent the *commission* of torts which are threatened or anticipated or in cases of continuing injuries to restrain their *continuance*. Specific relief will be granted by way of Injunction, to prevent the breach

¹ See *Clerk v. Lindsell*, 58—90; Pollock, 67—95; Underhill, 56—83; Alexander, 47, *et seq.*

² Underhill, 96—112; see also Alexander, 310 and Indian cases there

cited; Mayne on Damages; Collett's Law of Torts and the Measure of Damages; Clerk and Lindsell, *op. cit.*, Ch. VI.

of an obligation existing in favour of the applicant, whether expressly or by implication. The term "obligation" includes *every* duty enforceable by law, and, therefore, all those duties corresponding to rights *in rem* which are the subject-matter of the law of torts. Torts of all kinds may be restrained by Injunction. Theoretically it would seem that the Court has jurisdiction even to issue an Injunction against the threatened commission of such a personal tort as an assault. But whether it would ever exercise that power is another question, since the proper remedy of a person who is under apprehension of an assault is to apply under the criminal law to have the defendant bound over to keep the peace.²

Injunctions are rarely granted in the case of personal wrongs. Injunctions have, however, been issued against the publication of libel,³ and against slander of title.⁴ The most frequent instances of the exercise of Injunctive jurisdiction occur in the case of wrongs to property or to person and estate and property generally. And so Injunctions have been and are commonly granted against trespass,⁵ waste,⁶ disturbance of easements,⁷ infringements of patents,⁸ copyright,⁹ piracy of trade-mark,¹⁰ and nuisance.¹¹

¹ Act I of 1877, s. 54; as to temporary Injunctions, see ss. 492, 493, Civ. Pr. Code. If the decision in *Darab Kuar v. Gombi Kuar*, I. L. R., 22 All., 449 (1900) which holds that a temporary Injunction cannot be granted against an act of trespass means that s. 493 does not apply to cases of injury in tort, it is submitted it is erroneous. See also Clerk and Lindsell, 677, *et seq.*: "the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere," *per Jessel*, M. R., in *Aslatt*

v. Corporation of Southampton, 16 Ch. D., 148 (1880).

² Act I of 1877, s. 3.

³ Clerk and Lindsell, 678, 679 of Act I of 1877, s. 56, cl. (i).

⁴ See Act I of 1877, s. 55, ill. (e), which shows that Injunctions may be granted in the case of wrongs not injurious to property.

⁵ See *ib.*, s. 54, ill. (o).

⁶ See *ib.*, ill. (l), (m), (n).

⁷ See *ib.*, s. 55, ill. (a).

⁸ See *ib.*, s. 54, ill. (u).

⁹ See *ib.*, ill. (v).

¹⁰ See *ib.*, ill. (v) and Explanation to that section.

¹¹ See *ib.*, ill. (r), (s), (t).

The question of the grant of Injunctions in the case of defamation, and in these latter cases of wrongs affecting property, and to stay wrongful acts of a special nature is dealt with in subsequent Chapters of this work.

Principles
upon which an
Injunction
will be granted
in cases of
tort.

§ 66. An Injunction will only be granted to prevent the breach of an obligation that is a duty enforceable by law.¹ There must, therefore, be in the first place, a legal right and an invasion or threatened invasion of that right. It is not, however, in every case of injury or threatened injury that the Court will interfere by Injunction. The Court must be satisfied that the injury which is apprehended will be either continuous or frequently repeated or serious. In particular, an Injunction will not be granted to prevent on the ground of nuisance an act of which it is not reasonably clear that it will be a nuisance.² It is not, however, necessary that actual injury should have been suffered. When there is a practical certainty that substantial damage is imminent, the plaintiff may apply for an Injunction at once without waiting until it has actually happened.³ In order to maintain an action at common law, actual damage had to be made out; but it was not necessary to show that in an action for an Injunction. It was and is sufficient to shew that what has been done is likely to produce damage.⁴ Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual Injunction

¹ Act I of 1877, ss. 54, 3, v. *ante*, p. 98.

² Act I of 1877, s. 56, cl. (g).

³ Clerk and Lindsell's Torts, 679, 680, 684, as to serious damage, v. *ante*, p. 104 and *Boyson v. Deane*, I. L. R., 22 Mad., 251 (1898).

⁴ *Mellin v. White*, 1894, 3 Ch., 281. See as to the observations made in this

case on appeal (1895), A. C. 184; Clerk and Lindsell's Torts, 684, 685, where it is pointed out that certain passages in the judgments of the appeal Court must not be understood as throwing any doubt upon the possibility of bringing an action for an Injunction *quia timet* before any damage has actually happened.

restraining the continuance of that act, even though no damage has actually occurred before institution of suit. And where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury.¹ Thus in the case last cited, the plaintiff and defendants owned adjoining lands. Close to the boundary line the defendants dug a trench 110 feet long and 9 feet deep, the sides towards the bottom sloping in the direction of the plaintiff's land. The plaintiff sued for a perpetual Injunction restraining them from continuing to dig, for the cost of filling up the excavation and for other relief. The defendants pleaded that they had a right to dig as they pleased on their own land, and, that as the plaint did not allege any injury, it disclosed no cause of action. The first Court held that no cause of action accrued until damage had actually occurred, and therefore dismissed the suit. Upon appeal to the High Court the learned Judges, in dealing with an order of remand which had been made, observed as follows :—

“If the Munsiff was right in holding that actual injury would alone give a cause of action, then he was right in dismissing the suit, because anything that happened subsequent to the institution of the suit could not supply a cause of action which did not exist before. In our opinion he was wrong in his view of the law. A suit for Injunction may be a suit for preventive relief, and, under section 54 of the Specific Relief Act, a perpetual Injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The same section provides that when a defendant invades or threatens to

¹ *Bindu Basini Chowdhrami v. 260 (1896).*
Jahnabi Chowdhrami, I. L. R., 24 Cal.,

invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual Injunction in certain specified cases. Illustration (r) attached to the same section indicates a case in which an Injunction may be sued for to restrain a defendant from doing an act which threatens injury to the plaintiff's property, although no such injury had actually ensued. In the case of *Pattison v. Gilford*¹ the Master of the Rolls, speaking of the principles upon which a Court of Equity interferes when an Injunction is asked for, says: 'I take it that, in order to obtain an Injunction, a plaintiff who complains, not that an act is an actual violation of his right, but that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say a violation of the right may be the result; the plaintiff must show that a violation will be the inevitable result.' And then he proceeds to cite a case decided by Lord Tottenham, and another case in which the Lord Chancellor says: 'I consider this Court has jurisdiction by Injunction to protect property from an act threatened, which, if completed, would give a right of action. I by no means say that in every such case an Injunction may be demanded as of right, but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an Injunction will be granted.' The facts of that case had, it is true, no analogy to the present case, but still the Master of the Rolls was dealing with the principle upon which relief is given against a threatened wrong, and the case is, we think,

¹ L. R., 18 Eq. 259.

an authority that such a suit will lie when the threatened act is of such a character that it must inevitably result in injury—inevitably in the sense in which the Master of the Rolls says he uses the word, that is to say, not in the sense of there being no possibility the other way, because Courts of Justice must always act upon the theory of very great probability being sufficient, but in the sense that there must be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow. The Munsiff was, therefore, we consider, wrong in holding that, as a matter of law, actual injury before suit must in every case be alleged and proved in order to maintain the suit, and that it is sufficient, if it is alleged that the result of the act complained of must inevitably, in the sense we have stated, flow from it. Whether the case is one in which an Injunction or any other relief should be granted, or what precise form the Injunction should take are questions which the Courts, dealing with the facts, must decide with reference to the provisions of sections 53 and 54 of the Specific Relief Act. It may be that the plaintiff is not entitled to the relief which she claims or to relief in the particular form in which she claimed it, but that would not make the suit unmaintainable. Now, no better proof of the inevitable consequence of an alleged act can be given than that the contemplated injury had actually occurred, and, we think, it is quite competent for the plaintiff in this case to give evidence of that injury, although it had not occurred prior to the institution of the suit, and for the purpose, and in order to give due notice to the defendants of the fact, which it is intended to prove, the plaint might properly be amended.’’¹

¹ *Bindu Basini Chowdhurani v. Cal., 263—265 (1896), v. ante, p. 101*
Jahnabi Chowdhurani, I. L. R., 24

Assuming that there has been an invasion or threatened invasion of a legal right involving substantial damage, the applicant for an Injunction must have a personal interest in the matter.¹ Further, he must not have acquiesced in the wrong complained of.² The Court will consider whether the plaintiff by his acquiescence in the defendant's conduct has caused him to alter his position. A person should complain without delay before expenditure has been accrued and the defendant's position has been altered. But, as there can be no acquiescence without knowledge, mere lapse of time between the defendant's commencing to incur the expenditure and the application for an Injunction will be immaterial if the plaintiff did not become aware of the expenditure until after it was completed. Acquiescence, moreover, seems to be regarded as the subject of degree, it being said that a less degree of acquiescence will justify the refusal of an interlocutory Injunction than will justify the refusal of an Injunction at or after the hearing.³ As a general rule, mere delay, not causing the defendant to alter his position, even though the plaintiff may have been perfectly aware of the infringement of his rights, is no ground for refusing an Injunction, unless it is so long as to bring the case within the statute of limitation.⁴

The conduct of the applicant or his agents must not have been such as to disentitle him to the assistance of the Court.⁵ And an Injunction will not be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust.⁶ The Court will consider the question of the

¹ Act of 1877 s. 58, cl. (k).

² *Id.*, cl. (4).

³ *Wick and Lushell, op. cit.*, 682

⁴ *Id.*, p. 114

⁵ *Ib.*, v. *ante*, p. 118.

⁶ Act I of 1877, s. 58, cl. (j); v. *ante*, p. 125.

⁷ *Ib.*, cl. (i); v. *ante*, p. 121.

balance of convenience,¹ and in the exercise of the wide discretion with which it is vested, the whole of the circumstances of the particular case.² Under the provisions of the Specific Relief Act³ when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property,⁴ the Court may grant a perpetual Injunction in the following cases, namely :—(a) Where the defendant is trustee of the property for the plaintiff ; (b) where there exists no standard for ascertaining the damage caused or likely to be caused ; (c) where pecuniary compensation would not afford adequate relief ; (d) where it is probable that pecuniary compensation cannot be got ; and (e) where the Injunction is necessary to prevent a multiplicity of judicial proceedings.⁵ So an Injunction will be granted to restrain a bare trespass, if the Court is satisfied that it will, unless restrained, be frequently repeated ; the ground upon which relief is given being to prevent the plaintiff being put to the trouble and inconvenience of having to bring successive actions from time to time to recover a series of small damages.⁶

¹ Clerk and Lindsell, *op. cit.*, 681 ; *v. ante*, p. 124.

² See generally as to the principles upon which an Injunction will be granted (Ch. II, *ante*). So the interests of third persons must be in some cases considered ; as for instance, where the granting of an Injunction would cause the stoppage of trade and the throwing out of work of a large number of work-people. Clerk and Lindsell, *op. cit.*, 682 ; *Woode v. Sutcliffe*, 2 Sim. N. S., 165.

³ Act I of 1877, s. 54.

⁴ The Act apparently does not contain the principles regulating the issue of Injunctions in cases other than those of injury to property, *e. g.*, purely personal wrongs, such as libel,

though it is quite clear that it has jurisdiction to restrain acts not injurious to property. See s. 55, ill. (e), and as to libel the following Chapter.

⁵ *v. ante*, Ch. II, for a commentary on these rules and as to clause (b), see also *Sri Sadagapa v. Srimahant*, I. L. R., 22 Mad., 193 (1898).

⁶ Clerk and Lindsell, *op. cit.*, 679. Illus. (p) and (g) of Act I of 1877, s. 54, are both examples of cl. (e) of that section. Ill. (p) assumes that the suit has been so brought, as, under s. 43, to be binding upon [see s. 42, ill. (a)] all the villagers. In the illustration the Injunction is supposed to be limited to restraining suit, but it might also have been to

The Injunction which will be granted may be temporary¹ or perpetual.² In either case the Injunction may, if necessary, be in a mandatory form.³ The Court may grant damages either in substitution for, or in addition to, an Injunction. There may be a combination of damages and an Injunction, where the circumstances require it.⁴ It is doubtful whether the English Courts have jurisdiction to award damages in lieu of an Injunction where the injury is not yet committed, but threatened only, but apparently the inclination of the Court is in the direction of holding that it has not.⁵

Limitation.

Suits for compensation for torts not specially provided for in the schedule of the Limitation Act (XV of 1877) are governed by article 36 of that Act, under which the period is two years. Torts to the person or reputation as well as suits for compensation for wrongful distress or seizure of property are governed by the one year's rule (arts. 19—27). Most instances of torts to moveable and immoveable property are governed by the three years' rule (arts. 37—41, 48, 49). A similar period governs suits for compensation for injury caused by an Injunction wrongfully obtained (art. 42). Sixty years is the period in the case of all suits by the Government. As already explained, laches may affect the question of the grant of an interlocutory Injunction. No specific

restrain the doing any acts under the pretence of right. Collett's Specific Relief Act, 312, 313.

¹ Civ. Pr. Code, ss. 492-493; Act I of 1877, s. 53. A case of substantial damage must be made out: *Shepherd v. Trustees of Port of Bombay*, I. L. R., 1 Bom., 145 (1876).

² Act I of 1877, ss. 52, 53.

³ v. *ante*, p. 131 The granting of an order in effect mandatory is an exercise of jurisdiction, which the Court

is generally very unwilling to resort to on an interlocutory application; *Shepherd v. Trustees of Port of Bombay*, I. L. R., 1 Bom., 145 (1876).

⁴ *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 77, 91 (1883); v. *ante*, p. 149 as to damages in substitution, see *Fritz v. Hobson*, 14 Ch. D., 548.

⁵ *Martin v. Price*, 1894, 1 Ch., 284; Clerk and Lindell, *op. cit.*, 686.

provision is made in the schedule of the Limitation Act for suits for a perpetual Injunction,¹ and the period of six years under article 120 will be applicable to such a suit.² The doctrine, however, of laches being applicable to suits for Injunctions, the Courts may in the exercise of their discretion decline to make a decree, even if a much lesser time than six years has elapsed.³

¹ Except suits for Injunction to restrain waste, which are governed by art. 41.

² *Kanaka Saha v. Mutta*, I. L. R., 13 Mad., 445 (1890). The Court in this case further held that as the

plaintiff might have sued for possession and so obtained equally efficacious relief, the exceptional form of relief by Injunction had been legally refused to him.

³ See Mitra's Limitation Act, 764.

CHAPTER VIII.

INJUNCTIONS IN CASES OF DEFAMATION, MALICIOUS WORDS AND SLANDER OF TITLE.

§ 67. PERSONAL INJURIES.

§ 68. DEFAMATION:

- (i) Libel;
- (ii) Slander.

§ 69. MALICIOUS WORDS AND SLANDER OF TITLE.

§ 70. INJUNCTIONS IN CASES OF DEFAMATION, MALICIOUS WORDS AND SLANDER OF TITLE.

Personal In-
juries.

§ 67. Personal wrongs are such as affect the safety and freedom of the person; personal relations in the family; wrongs affecting reputation; and wrongs affecting estate generally, such as, amongst others, malicious words and slander of title.¹ As already observed² torts of all kinds including therein personal wrongs, may be restrained by Injunction. So theoretically the Court has jurisdiction to restrain so personal a wrong as an assault, though whether it will exercise that jurisdiction is more than doubtful. In other words though the jurisdiction exists in the case of all torts, that jurisdiction may not in fact be exercised owing to the peculiar character of, and circumstances attending certain forms of tort. It may be that the wrong is of too slight a character, or is remediable by damages, or equally efficacious relief may be obtainable otherwise than by Injunction. Though, as a matter of fact, Injunctions in the case of personal wrongs have been generally confined to cases of defamation,

¹ v. *ante*, Ch. VII.

² v. *ante*, Ch. VII.

malicious words and slander of title, the jurisdiction exists, and may be exercised in other cases. •

§ 68. The right of each man to the unimpaired possession of his reputation and good name is a legal right. Inasmuch as reputation depends upon opinion, and opinion in the main on the communication of thought and information from one man to another, he who directly communicates to the mind of another matter untrue and likely in the natural course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong for which the remedy is an action of defamation for damages, and if the circumstances justify it, an Injunction.¹ Defamation may be embodied either in writing or in some other permanent form in which case it is called libel, or it may be otherwise published in some fugitive manner, when the tort committed is slander.

A libel is a false defamatory and malicious writing, (i) Libel. picture, or the like tending to injure the reputation of another.² Libels are generally in writing or printing, but this is not necessary; the defamatory matter may be conveyed in some other form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel.³ A libel is of itself an infringement of a right, and no actual damage need be proved in order to sustain an action. The defendant, however, may plead justification, that is, the truth of the libel, because the law will not permit a man to recover damages in respect of an injury to character

¹ Clerk and Lindsell's *Torts*, 473.

² Underhill on *Torts*, 135; anything is defamatory which imputes conduct or qualities tending to disparage or degrade the plaintiff or to expose him to contempt, ridicule, or

public hatred, or to prejudice his private character or credit, or to cause him to be feared or avoided; *ib.*, 137.

³ *Monson v. Tussauds, Limited* (1894), 1 Q. B., 692.

which he either does not, or ought not to, possess; and he may also plead privilege and will be protected thereby in the absence of malice.¹ An action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business without proof of special damage.²

(II) Slander.

Slander is a false defamatory and malicious verbal statement tending to injure the reputation of another.³ Slander, unlike libel, is not of itself according to English law an infringement of a right unless damage ensues, either actually or presumptively. Damage will be presumed where the slander imputes a criminal offence punishable by imprisonment; unfitness for society; or misconduct in, or want of some necessary qualification for, the plaintiff's profession or trade or office of profit, or some conduct which might cause him to be deprived of an office of honour.⁴ Upon the question whether the rule of English law which requires proof of special damage to sustain an action for slander except in special cases, is applicable in this country there is still a conflict of authority.⁵ The distinction which has been drawn between written and verbal defamation has been condemned by many Judges and authorities of eminence both in

¹ See Alexander on Torts, 247.—262. As to the issue of interlocutory Injunctions where privilege is pleaded, see *Quartz Hill, &c., Mining Co. v. Beall*, 20 Ch. D., 507; *Societe &c., de Glaces v. Tilghman's, &c., Co.*, 25 Ch. D., 1; *Poulett v. Chatto* (1887), W. N., 192, and where justification is pleaded, *Bonnard v. Perryman*, 1891, 2 Ch., 269; *v. post*.

² *South Helton Coal Company, Ltd. v. North-Eastern News Association, Limited* (1894), 1 Q. B., 133.

³ Underhill, *op. cit.*, 135. Slander may also be communicated by other sounds than words, as by hissing (*Gregory v. Brunswick*, 6 M. & G., 959) or by gestures (*Gutsole v. Mathers*, 1 M. & W., 501).

⁴ Underhill, *op. cit.*, 135, 152.

⁵ See Alexander on Torts, pp. 263—265, and cases there cited. The Full Bench decision cited in the next note does not settle this question as the language in that case was held not to be defamatory.

England and this country.¹ It has however now been settled by the Calcutta High Court that abusive and insulting language not amounting to defamation is not actionable.²

§ 69. "Words cannot of themselves amount to a direct infringement of any right except that of reputation and cannot, therefore, apart from consequences, give a cause of action except when they are defamatory of the person complaining. They may, however, be the cause of damage to a man in the conduct of his affairs, and such damage may amount to a legal wrong. If property of any kind is for sale, and any one, without lawful motive, comes forward and falsely alleges that any incumbrances, charges or liabilities exist with respect to it, or otherwise impeaches or cuts down the right or capacity of the vendor to make a good conveyance, and in consequence the bargain goes off, an action lies, which is commonly known under the name of 'slander of title.' This is not properly an action for words spoken or for libel written or published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title."³ So it may be slander of title to allege of any one that he is selling goods in infringement of a patent or copyright,⁴ or to set up a false claim of lien,⁵ or analogously to disparage the quality of a man's goods and thereby prevent their sale.⁶

Malicious words and slander of title.

¹ *Girish Chunder Mitter v. Jata-dhari Sadukhan*, F. B., reference I. L. R., 26 Cal., 653 (1899).

² *Ib.*

³ Clerk and Lindsell's Torts, 546.

⁴ See *Wren v. Wield*, L. R., 4 Q. B., 730; *Dicks v. Brooks*, 15 Ch. D., 22; cf. 46 & 47 Vic., c. 57, s. 32.

⁵ *Green v. Button*, 2 C. M. & R.,

707.

⁶ *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Ex., 218; this principle seems to be assumed in *White v. Mellin* (1896), A. C., 154, though upon another ground doubts are in that case thrown upon the abovementioned decision; Clerk and Lindsell's *op. cit.*, 547.

Other false and malicious statements causing damage may also be actionable. So where a plaintiff lost her marriage through the defendant falsely and maliciously alleging that she was already married, the plaintiff was held to have a good cause of action;¹ as was also the case where the plaintiff, a shop-keeper, lost customers through a false and malicious allegation that his wife who assisted in the business, had misconducted herself on the premises.² The effect of the authorities seems to be that a wrong is committed, and a corresponding remedy is given whenever false statements maliciously made produce as a natural consequence damage which is capable of legal estimation.³ Actions of this kind have in modern times generally arisen as between rival traders, in cases in which a dealer in a particular commodity has published a statement disparaging the quality of his rival's goods. In such cases an action will lie, if the statement is false, malicious and followed by damage. But when the only disparagement consists in the defendant's vaunting the superiority of his own goods, it has been doubted whether the action will lie, it being undesirable to turn the Courts into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better.⁴

Injunctions in cases of defamation, malicious words and slander of title.

§ 70. The Court of Chancery had formerly no power to grant Injunctions, except in cases where there was injury either actual or prospective to property.⁵ An Injunction could therefore not have been had under the former procedure to restrain the publication of a libel, though publications as to which there was a jurisdiction to restrain would not be restrained the less because they

¹ *Shepherd v. Bateman*, 1 Sid., 79. *Mellin* (1895), A. C., 164, 172.

² *Riding v. Smith*, 1 Ex. D., 91.

³ *Emperor of Austria v. Day*, 3 D.

⁴ *Clerk and Lindsell's Torts*, 547.

F. & J., 253.

⁵ *Ib.*, 546—553. See *White v.*

happened also to be libellous.¹ Prior to the Common Law Procedure Act, 1854, neither Courts of Law nor Courts of Equity could issue Injunctions in cases of libel; not Courts of Equity, because cases of libel could not come before them; not Courts of Law because prior to 1854 they could not issue Injunctions at all.

The Common Law Procedure Act conferred on Courts of Common Law the power, if a fit case should arise, to grant Injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation. This power was by the Judicature Act, 1873, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity. Nevertheless, although the power had existed since 1854, there is no reported instance of its exercise until 1878. About the same time the Chancery Division began, and it has since continued to assert the jurisdiction of granting Injunctions on the interlocutory application of one of the parties to an action for libel. But that jurisdiction is now well established, and the Courts have jurisdiction to restrain by Injunction and even by an interlocutory Injunction the publication of a libel.²

Similarly in India, prior to the passing of the Specific Relief Act, it was held by the Bombay High Court that no Injunction will be granted to restrain the publication of a libel, and that an individual is not entitled to protection by way of Injunction against the act of a corporation,

¹ *Prudential Assurance Co. v. Knott*, L. R., 10 Ch. App., 142 (1876); *Kerr, Injunction*, 2, 502; the Court of Chancery before the Judicature Act had power to intervene by Injunction, to protect property, but not to protect character; it had no power to try a libel. *Collard v. Marshall* (1892), 1 Ch., 577. The publications referred

to are those made in breach or abuse of confidential relations, such as the publication of documents by solicitors, agents, clerks, &c.; *Shepherd v. The Trustees of the Port of Bombay*, 1 L. R., 1 Bom., 140 (1876).

² *Bonnard v. Perryman* (1891), 2 Ch., 269, 283; *Monson v. Tussauds, Limited* (1894), 1 Q. B., 692, 693.

though in excess of their powers, which affects that individual's character and reputation, whether private, professional or commercial, which he could not have been entitled to, had the act complained of been committed by an individual defendant on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.¹ Now, however, under the Specific Relief Act, 1877, the Court may grant an Injunction to restrain the publication of a libel even though it may be shown not to be injurious to the complainant's property.²

It has, however, been held in England that the jurisdiction to restrain libel is discretionary, and an interlocutory Injunction ought not to be granted except in the clearest cases—in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable.³ And so an interlocutory Injunction was refused where the defendant swore that he would be able to justify the libel and the Court was not satisfied that he might not be able to do so;⁴ and where the Court was not satisfied upon the affidavits that the defendant had not consented to the publication of the libel.⁵

The reasons assigned for the sparing exercise of the jurisdiction are twofold, viz. (1):—Until it is clear that

¹ *Shepherd v. The Trustees of the Port of Bombay*, I, L. R., 1 Bom., 132 (1876); see also *ib.*, at p. 477.

² Act I of 1877, s. 55, ill. (e). This illustration and ill. (f) should strictly have been placed under s. 54. The injunction supposed to be granted is not mandatory. These illustrations are probably annexed to s. 55 because of the use made of them in ill. (g). Collett. 344.

³ *Bonnard v. Perryman* (1891), 2 Ch., 269 [approving *Couleon v. Couleon*, 3 Times L. R., 846; followed in *Coltard v. Marshall* (1892), 1 Ch., 571; *Monson v. Tusaude, Limited* (1894), 1 Q. B., 671; *Oppenheim v. Mackenzie*, 3 Cal. W. N., 1.

⁴ *ib.*

⁵ *Monson v. Tusaude Limited* (1894), 1 Q. B., 671

an alleged libel is untrue, it is not clear that any right at all had been infringed ; and the importance of having free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interlocutory Injunctions. The right of free speech is one which it is for the public interest that individuals should possess, and indeed that they should exercise without impediment so long as no wrongful act is done ; and, unless an alleged libel is untrue, there is no wrong committed ; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel.¹ (2) Because the questions of libel or no libel, and of the validity of a justification, if pleaded, are matters to be determined by the verdict of a jury.² Libel or no libel has in England since Fox's Act, whether in civil or criminal cases, been always regarded as essentially a question for the jury. Though that Act only applied to indictments and informations for libel, the practice under that Act had been followed in civil actions for libel, that the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document and to say whether it was a libel or not. To justify the Court in granting an interlocutory Injunction it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore the jurisdiction is of a delicate nature.³

It is clear that the second of the above-mentioned grounds in restraint of the issue of interlocutory Injunctions in cases of libel has no force in this country.

¹ *Bonnard v. Perryman* (1891), 2 Ch., 284, per Lord Coleridge, C. J.; (see *Collard v. Marshall* (1892), 1 Ch., 577.)

² *Ib.*, p. 285, per Kay, L. J.

³ *Monson v. Tussauds, Limited* (1891), 1 Q. B., 693, 696, per Lopes, L. J.

where there is no jury in civil cases. The first of these grounds, moreover, is intimately connected with the second, in that in England the limits assignable to freedom of speech are those which have been laid down from time to time by juries, in cases which have come before them. The exception also to the general rule has again in view the anticipated verdict of a jury. There does not therefore appear to be in this country so much, if any, reason for the limited exercise of the jurisdiction. In the case of every application for a temporary Injunction the Court has no doubt to act with caution, but it is submitted that there is no ground in reason why the Courts should be more cautious in restraining the commission of an alleged libel than in restraining any other alleged tort. And this is the more so, inasmuch as a tort to reputation is of as grave, if not of a graver, character than torts to property only, which in a large number of cases are remediable by money-compensation.

The Court will when necessary issue a mandatory Injunction ordering the defamatory statements to be given up and destroyed.¹

Where a defendant objected that in the publication of an alleged libel he was merely acting as Secretary to the Committee of a certain trade-union and therefore that no Injunction ought to go against him, it was held to be clear that, if the plaintiffs had in other respects made out their case, the circumstance that the defendant was acting under the orders of others was no defence, as he was not on that account less responsible for his own wrongful acts.²

With regard to slander the Courts have jurisdiction, wherever such slander is actionable, to restrain its

¹ Act I of 1877, s. 55, ill. (g).

² *Collard v. Marshall* (1892). 1 Ch., 575.

repetition. Inasmuch however as abusive and insulting language not amounting to defamation is not actionable,¹ no Injunction can issue in such a case. The Court has jurisdiction also to restrain slander of title or malicious statements, which are in the nature of slander of title. It may thus restrain a person from making slanderous statements calculated to injure another man in his business, and though the jurisdiction extends to oral as well as written statements, great caution, it has been said, should be required as respects oral statements.²

The Court has power to restrain by Injunction on interlocutory motion the publication of placards and circulars containing statements injurious to trade, where the Court is satisfied upon the facts and evidence before it that such statements are false.³

If a statement complained of is a false and malicious statement about a plaintiff's goods to the disparagement of them, and, if that statement has caused injury to the plaintiff, an action for an Injunction will lie.⁴ But there is no rule of equity under which it may be said generally that the Court will restrain every publication of a false statement. And where special damage is the gist of a tort such damage must be alleged and found whether the action be for damages or an Injunction, otherwise a tort in the eye of the law would not be disclosed, and therefore the case would not be one for an Injunction.⁵

¹ *v. ante.*

² Kerr, Inj., 504.

³ *Collard v. Marshall* (1892), 1 Ch., 571.

⁴ *Mellin v. White* (1894), 3 Ch., 276, 280 (1895), A. C., 154. In this particular case none of the condi-

tions were satisfied and the decision of the Appeal Court was reversed by the House of Lords. A. C. (1895), 154, *v. ante.*

⁵ *Mellin v. White*, A. C. (1895), 162, 163.

CHAPTER IX.

INJUNCTIONS AGAINST TRESPASS AND WASTE.

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| <p>§ 71. TRESPASS.</p> <p>§ 72. INJUNCTIONS AGAINST TRESPASS.</p> <p>§ 73. WHO MAY SUE AND BE SUED IN RESPECT OF TRESPASS.</p> <p>§ 74. WASTE.</p> <p>§ 75. INJUNCTIONS AGAINST WASTE.</p> <p>§ 76. AGAINST WHOM SUCH INJUNCTIONS WILL BE GRANTED:</p> <ul style="list-style-type: none"> (i) Tenants for life, or years, or in tail; (ii) Hindu female heirs; (iii) Landlord and tenant: <ul style="list-style-type: none"> (a) Agricultural leases. Waste in respect of— <ul style="list-style-type: none"> (i) Buildings, (ii) Excavations, (iii) Trees, (iv) Cultivation. (b) Non-agricultural leases; (iv) Dependent talookdar; (v) Mortgagor and Mortgagee; (vi) Vendor, purchaser and others. | <p>§ 77. TRESPASS AND WASTE BY CO-SHARERS:</p> <ul style="list-style-type: none"> (i) Co-sharers; (ii) Waste and trespass by co-sharers: <ul style="list-style-type: none"> (a) Joint user, (b) Abuse of joint property; (iii) Remedies in respect of the abuse of joint property: <ul style="list-style-type: none"> (a) Partition, (b) Declaration of right, (c) Decree for joint possession, (d) Injunction; (iv) Principles upon which an injunction is granted in the case of co-sharers: <ul style="list-style-type: none"> (a) Cultivation, (b) Buildings, (c) Excavations. <p>§ 78. PERSONS FOR WHOM INJUNCTIONS AGAINST WASTE MAY BE GRANTED.</p> <p>§ 79. ACCOUNT IN CASES OF WASTE.</p> |
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Trespass.

§ 71. Trespass may either be to the person (as in the case of assault or false imprisonment), to chattels (as in the case of every direct forcible injury or act, disturbing the possession of goods without the owner's consent), or to land, which is the case here dealt with. Trespass consists in any unjustifiable intrusion upon a person's possession, possession being the present enjoyment of a

definite portion of the soil by a person intending to enjoy it as owner. As to what invasion of possession amounts to a trespass it is said that every unwarrantable entry on another's soil is a trespass, by breaking his door, the words of the old writ of trespass commanding the defendant to show cause *quare clausum querentis*. *Jregit*. In order to maintain an action of trespass the plaintiff must be in the possession of the land; for it is an injury to possession rather than to title. Possession may be either without, or with title. A party claiming to have possession without title must, in order to give him what the law understands by possession, and to enable him to bring an action of trespass, show that he has a *de facto* possession, that is to say, actual physical apprehension of the particular portion of the soil, to the substantial exclusion of all other persons from participating in the enjoyment of it.¹

Mere possession is good against all the world except the real owner, and is protected both by the Civil² and Criminal Law.³ Possession is also *prima facie* proof of ownership, since men generally own the property which they possess.⁴ Where a person is in possession of land, the onus lies upon the *prima facie* trespasser to show that he is entitled to enter.⁵ The possession of land suffices to maintain an action of trespass against any person wrongfully entering upon it; and, if two persons are in possession of land, each asserting his title to it, then the person who has the title to it is to be considered in actual

¹ See Clerk and Lindsell on Torts, Ch. XIII; Underhill on Torts, 303. *et seq.*

² Act I of 1877, s. 9, under which a possessory suit may be brought in which the question of title is im-

material. See Smith's Leading Cases, Notes to *Armory v. Delamirie*.

³ Cr. Pr. Code, Ch. XII; Penal Code, ss. 154, 158.

⁴ Evidence Act, s. 110.

⁵ *Asher v. Whitlock*, L. R., 1 Q. B., 1.

possession, and the other person is a mere trespasser.¹ The possession of a person, who having title to the land has entered, continues in him, until he has been dispossessed, that is to say, until some other person has acquired a *de facto* possession. His possession differs from that of a person, who has no title, in this, that it need not be exclusive. Even in the case of wrongful user, his title will give him the constructive possession. And this constructive continuity of possession will prevent mere non-user from being construed as an abandonment.² Joint tenants or tenants-in-common, can only sue one another in trespass for acts done by one inconsistent with the rights of the other, as in the case of the destruction of buildings, injuries to party-walls, carrying off of the soil, or expulsion of the plaintiff from his occupation.³ A person who has been dispossessed may sue to recover possession, and for damages and mense profits, and Injunction; and a person in possession whose right has been infringed by a trespass may sue for damages and for an Injunction restraining the commission of such trespass.

Injunctions
against
trespass.

§ 72. The granting of Injunctions against the commission of trespass seems to have grown out of the jurisdiction in cases of waste, to which the relief was formerly confined. Privity of title being the essential ground of the interference in restraint of waste, it was not until a comparatively recent period that the rule was relaxed to admit of the relief against a naked trespass, unaccompanied with privity of title. The jurisdiction is, however, now well established, although it is still sparingly exercised,

¹ *Jones v. Chapman*, 2 Ex., 321.

² Clerk and Lindsell, *op. cit.*, 289;
Smith v. Lloyd, 9 Ex., 562.

³ Underhill on Torts, 209; see

Jacobs v. Senard, L. R., 5 H. L.,
464. See Indian decisions cited
post, and in Alexander on Torts,
116—121.

being confined to cases where from the peculiar nature of the property affected by the trespass, or from its frequent repetition, the injury sustained cannot be remedied by an action for damages. The foundation of the jurisdiction rests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of a multiplicity of suits, and where facts are not shown to bring the case within these conditions, the relief will be refused.¹

Prior to the Judicature Act the decisions relating to Injunctions in case of trespass were classified under two heads:—(1) where the defendant was in possession ; (2) where the plaintiff was in possession. And the second head was subdivided into the cases—(a) of pure trespass where the defendant was an absolute stranger, and (b) where the defendant claimed under colour of right.²

Inasmuch as, without possession, actual or constructive, a person cannot bring trespass, the first of the above heads of cases (sometimes discussed along with cases of trespass), in which the plaintiff is out of possession and seeks an Injunction to restrain acts by the person in possession, who claims by title adversely to him, should be excluded. The defendant being in possession and the plaintiff seeking to eject him, the sole question between them

¹ High. Inj., § 697 ; as illustrating s. 54 of the Specific Relief Act, cl. (b), see *ib.*, s. 703 [where land was for many years held and used by the owner as a family burial ground, defendants were enjoined from encroaching thereon and from a threatened removal of the remains of persons interred therein: In such a case there can be no standard by which to estimate the damages sustained since the extent of the injury is dependent upon the

feelings and views of the persons aggrieved. *Mooney v. Cooledge*, 30 Ark., 640 (Amer.)]. Upon the principle enacted by cl. (d) of s. 54, the insolvency of the trespasser affords additional ground for interference, since his inability to respond in damages renders the remedy at law ineffectual. *Ib.*, s. 707. *Stewart v. Chew*, 3 Bland., 440 (Amer.)

² See judgment of Kindersley. V. C., in *Lowndes v. Bettle*, 33 L. J. Ch., 451.

is as to the title to the land. If this be in the plaintiff, the defendant is a mere trespasser. Such ordinary ejectment cases are distinguishable from those coming under the second of the above heads, where the injury is a trespass or forcible invasion of plaintiff's possession of his property.

In cases where the relief sought is ejectment, Courts in India may clearly by means of an Injunction secure the property from damage during litigation. At the same time care must be taken lest by interfering with the ordinary rights of ownership the mere institution of a suit should operate as a vexatious interruption to the enjoyment of property. The English Courts for special reasons¹ formerly hesitated as to these cases and refused to interfere by Injunction where the plaintiff was out of possession, unless there was fraud or collision, or unless the acts perpetrated or threatened were so injurious as to tend to the destruction of the estate.² Where the plaintiff is in possession there may be, as already observed, a pure trespass or a trespass under colour of title.³ In both cases the Courts must be guided by a wise discretion according to the facts of the case and the principles enacted by the Specific Relief Act.⁴

In ordinary cases of trespass where the trespasser is a mere stranger, a judgment which declares his right and awards damages is sufficient. But where the defendant is himself entitled to possession as well as the plaintiff and his wrongful act has been committed under claim of right, the Court is justified in protecting the plaintiff's interest by means of a perpetual Injunction.⁵

Collett's Specific Relief Act,
309, 267, 268.

¹ Kerr, Inj., 111.

² See as to this expression *Davenport v. Davenport*, 7 Ha., 217.

⁴ See s. 54, illa. (o), (r).

⁵ *Stalkart v. Gopal Panday*, 20 W. R., 168, 169 (1873); S. C., 12 B. L. R., 197.

Formerly the tendency of the Courts was not to grant an Injunction where the trespasser was an utter stranger, unless the acts tended to the destruction of the estate or there were special circumstances. On the other hand, where the party in possession sought to restrain one who claimed by adverse title, there the tendency was to grant the Injunction, at least where the acts done either did or might tend to the destruction of the estate.

These distinctions have, however, lost much of their importance in England since the Judicature Act, which enables the Courts to grant an Injunction in all cases, if it shall think fit.¹ So also in India the Courts may grant an Injunction in all the cases of trespass abovementioned according to their discretion, such discretion to be exercised with regard both to the principles enacted by the Specific Relief Act and the circumstances of the particular case. Upon the subject of damage it must, however, be remembered that an act not amounting in itself to serious damage may, from its continuance, amount to trespass attended by irreparable damage, and there are cases where great damage may be done to property, though the actual damage done by the trespass is nothing.²

Where a trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by Injunction to restrain the defendant from continuing such trespass merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced.³

¹ Kerr, *Inj.*, 115.

² *Ib.*, 117.

³ *Chabildas Lallubhai v. The Municipal Commissioner of Bombay*, 8 Bom. H. C. R., O. C. J., 85 (1871).

As to mere apprehension of trespass, see *Gibbon v. Abdur Rahman Khan*, 3 B. L. R., A. C., 411 (1869); *Poran Chand Galecha v. Pareshnath Singh*, 12 W. R., 82 (1869).

Though the jurisdiction by mandatory Injunction to compel the restoration of matters *in statu quo* is sparingly exercised, yet a trespass irreparable in its character and of a continuing nature may be restrained by a mandatory Injunction, thus restoring things to their original condition.¹ There must, however, be no delay on the part of the plaintiff in bringing his suit.² A mandatory Injunction should not be granted against a trespasser compelling him to come on the land on which he had trespassed to remove an encroachment made thereon by him.³

So where the defendant built a wall on the plaintiff's land and thereby committed a trespass the plaintiff in a suit brought for that purpose obtained damages for the trespass and a mandatory Injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition.⁴

The commission of a trespass may subject the offending party to an account which will be taken on varying principles according as the acts complained of have been fraudulent and wilful, or inadvertent, and under a *bonâ fide* belief of title.⁵ Compensation may be given for damage.⁶ After the establishment of his legal right and the fact of its violation, the plaintiff is entitled as of course to a perpetual Injunction, unless there be something special in the circumstances of the case.⁷ Where there has been found to be a continuing trespass by encroachment relief by way of Injunction is the proper remedy in such a case,

¹ High, Inj., § 708; Kerr, Inj., 163.

² *Haji Syed Muhammad v. Gulab Rai*, I. L. R., 20 All., 345 (1898); referring to *Benode Coomaree Dossec v. Soudamoney Dossee*, I. L. R., 16 Cal., 252 (1889).

³ *Navroji Maneckji Wadia v. Das-*

tur Kharsedji Mancherji, I. L. R., 28 Bom., 20 (1903).

⁴ *Jawatri v. H. A. Emile*, I. L. R., 13 All., 98 (1890).

⁵ Kerr, Inj., 161.

⁶ *Ib.*, 162.

⁷ *Ib.*, 165.

tor to allow compensation would be to let a trespasser put a value or money worth on another man's property and deprive him of it against his will.¹

Illustrations of the application of the abovementioned principles may be found in the Specific Relief Act,² and in the Indian decisions hereinbefore and hereinafter cited. Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree, and an Injunction restraining the wrong-doer. In such a suit the defence was that the land was *wakf*, and the defendant *mutwalli* of it. Both Courts found that the plaintiff was in possession as purchaser from some of those, who were entitled to sell. But the first Court did not find a fact, which the Appellate Court found, *viz.*, that the property had been constituted *wakf*. Both Courts, however, concurred in the finding that the defendant at all events was not the *mutwalli* and had no title. Held, that the plaintiff was entitled to a declaratory decree against this defendant as to his right and an Injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*; as to the validity of the endowment no decision being needed. This could not be decided either way in this suit as parties interested were not before the Court.³

Where the defendants under colour of an old farm were collecting from the ryots of the plaintiff's estate two annas rent over and above the full sixteen annas in the

¹ *Jethalall Herachand v. Lal-bhai Dalpatbhai*, I. L. R., 28 Bom., 298 (1904), see § 30 ante.

² Act I of 1877, s. 54, ill. (a) & (r).

³ *Ismail Ariff v. Mahomed Ghous*, I. L. R., 20 Cal., 834 (1893); S. C., 20 I. A., 99; distinguished in *Nisa Chand Gaita v. Kanchiram Bagani*, I. L. R., 26 Cal., 579 (1899).

rupee the Court granted an Injunction, being of opinion that an action would lie therefor even though no actual damage had been shown to have been caused to the plaintiff upon the ground that the owners would otherwise be prejudiced, difficulties and complications might ensue, and that the act complained of must necessarily cause injury.¹

In the case of trespass by public companies or public bodies the principles upon which the English Courts act in restraint of such trespass differ in some respects from those upon which they act in restraining trespass by individuals. Where a private person applies for an Injunction to restrain a public body from entering illegally upon his land he is not required to make out a case of destruction, trespass, or irreparable mischief. The Court will prevent such bodies from deviating in the smallest degree from the terms prescribed by the Statute which gives them authority. If they enter upon a man's land without taking the steps required by the Statute, the Court will at once interfere. The Court has not only jurisdiction to restrain them from affecting a man's land by stirring out of the exact limits prescribed by the Statute which gives them authority, but is almost bound, and will, as a matter of course, interfere, unless the damage is so slight that no injury has arisen, or is likely to arise, or unless the injury is so small as to be incapable of being appreciated by damages, or unless the remedy by damages is adequate and sufficient and the proper remedy, or the trespass is of a merely temporary nature.²

In an Indian case³ decided prior to the passing of the Specific Relief Act, Sargent, J., in discussing the

¹ *Nadirjamma Chowdhery v. Ram Chunder Surma*, W. R. (1864), 362.

² Kerr, *Inj.*, 118, 119.

³ *Chabildas Lalubhai v. The Municipal Commissioner of Bombay*, 8

Bom. H. C. R., 85, 91 (1871). The learned judge added "for the correct exposition of the law applicable to public companies and persons in a similar position, I can not do better

principles upon which the Court will interfere by Injunction to restrain acts of public functionaries in excess of their statutory powers, said that the rule that Courts of Equity will not restrain acts of trespass, unless the injury apprehended from them is of such a nature as that its repetition would cause irreparable loss to the plaintiff, applied only where the trespass complained of was that of a private individual, and not where the act is that of a public functionary. It is apprehended, however, that since the passing of the Specific Relief Act all cases of whatever nature must be decided by reference to the principles contained in that Act.

§ 73. It is as equally elementary that only the person, who commits the trespass, can be sued, as that without possession, actual or constructive, a man cannot bring an action of trespass the essential character of which is the forcible invasion of another's right of possession. In this as in all other torts the applicant must have a personal interest in the matter,¹ and his conduct and that of his agent's must not have been such as to disentitle him to the assistance of the Court.² There must have been no delay or acquiescence.³ The tenant or holder should sue in all cases of trespass, unless there is permanent damage to the property; the general rule being that the reversioner can only sue where there is a permanent damage to the reversion.⁴

Who may sue
and be sued
in respect of
trespass.

than to refer to Mr. Kerr's work on Injunctions at p. 295, where he says [*here follows the passage, a reference to which is given in the last note*]. "As to the acquisition of land for public purposes and for companies see Act I of 1894.

¹ Act I of 1877, s. 36, cl. (k).

² *Ib.*, cl. (j).

³ *Ib.*, cl. (h); Kerr, *Inj.*, 121.

⁴ See cases cited in Alexander on Torts, 122; this rule has been held not to apply where the landlord is, as it were, a partner with his tenants: *Venkata Chalam Chetty v. Andiappan Ambalam*, I. L. R., 2 Mad., 232 (1879).

A landlord who has only a constructive possession of lands through his tenant cannot obtain relief by way of Injunction under clause 2 of section 4 of the Mamlatdars' Act (Bom. Act III of 1876).

D sued in the Mamlatdar's Court, as *A*'s constituted attorney for an Injunction restraining defendants from causing any obstruction to his possession of certain lands. The land belonged to *A*'s husband, who was alleged to be a lunatic. But there was no adjudication of his lunacy nor was *A* appointed a manager of his estate under Act XXXV of 1858. Held that *D* had no right to sue. *A* not having been appointed a manager of her husband's estate, had herself no right to sue in respect of a disturbance of her husband's possession. She could not therefore authorize her agent to sue on her behalf.¹

If ryots are actually in occupation of their lands and are only interfered with and embarrassed in that occupation the proprietors are not entitled to sue, but the ryots themselves have a right to sue for an Injunction restraining the trespasser from interference. If they are ousted, the zemindar has a right to bring an action against the trespasser to recover possession. Where there has been an ouster from *zerai* land and the trespasser is cultivating indigo thereon the remedy is ejectment, and not an Injunction from cultivating the indigo, for such a prayer implies a right to cultivate other crops.²

If a stranger trespasses upon joint property one of the several persons jointly interested in the property is

¹ *Nemara v. Devandrappa*, I. L. R., 15 Bom., 177 (1890); following *Devi v. Keshavbhai*, I. L. R., 12 Bom., 419 (1887).

² *Nundun Lall v. Lloyd*, 22 W. R., 74 (1874). But as to the right of one of several joint tenants to eject

a trespasser, referred to in this decision; see cases cited in *Alexander on Torts*, 121, 122. A trustee can alone sue in ejectment. *Lachersteen v. Taruknath Poramanick*, Cor., 91 (1864).

entitled to restrain that stranger from committing the trespass.¹ If some of several coparceners purchase from a stranger trespasser a building erected by him on land jointly held by all the coparceners, such purchasers are *quoad* the building, trespassers, and a suit is maintainable by the remaining coparceners to be put into joint possession of the land covered by the building.²

A private person may sue in respect of a matter affecting the public interest, if he can make out a case of special damage or can show that greater damage is caused to him by the act complained of than is caused to the public in general.³

The fact that other persons have similar rights to those of the plaintiff does not necessarily make the latter's right a public right in the sense that no action can be brought upon it, unless special damage is proved. A right claimed may vest in the plaintiff severally as well as jointly with others.⁴ Where a plaintiff's suit to have the defendants restrained by Injunction from causing disturbance to him in cultivating his fields was rejected by the Mamlatdar, on the ground that his allegations were not proved against all the defendants, one of the defendants having been found not to have disturbed the plaintiff, it was held, reversing the order of the Mamlatdar, that there was nothing in the Mamlatdars' Act (Bom. Act III of 1876) to prevent the Mamlatdar from granting the Injunction as against the defendants against whom the case was proved. The High Court accordingly directed an Injunction to go under section 4 of the Mamlatdars' Act

¹ *Muhammad Ali Jan v. Faiz Bakh*, I. L. R., 18 All., 362 (1896).

² *Ib.*, 361.

³ *Kerr, Inj.*, 120.

⁴ *Venkatachala v. Kuppasami*, I. L. R., 11 Mad., 42 (1887) [right to graze cattle].

restraining the said defendants from causing the alleged disturbance to the plaintiff.¹

Waste.

§ 74. The torts of waste and trespass dealt with in this Chapter are wrongs to possession and property in respect of which Injunctions will issue upon the principles hereinafter stated. It is clear that an owner in possession of an absolute estate of inheritance has indefinite rights of use and dominion with power to waste land and to destroy chattels at his pleasure. Waste, therefore, has been defined as a substantial injury to the inheritance done by one having a *limited* estate during the continuance of that estate. Such injury may be caused either by diminishing the value of the estate or by increasing the burdens upon it or by impairing the evidence of title. The owner of the absolute estate has the right to require that the nature and character of the property shall not be changed by the owner of the limited estate. An act may therefore constitute waste which increases the value of the property, such as an act which increases the value of the estate, but which impairs the evidence of title or increases the burdens on the property. It is not, however, every conversion of land which constitutes waste. There must be an injury to the inheritance either "in the sense of value" or "in the sense of destroying identity": by what is called destroying evidence of the owner's title a peculiar head of the law which has not been extended in modern times. In times past, however, where evidence of title depended entirely upon the memory of witnesses an alteration of evidence of title was a very serious matter. But the existence of ordnance surveys and maps have greatly reduced the importance of such alterations, and

¹ *Chintamanur Narayan Gole v. Bala*, 1. L. R., 14 Bom., 17 (1889).

the Courts will consider only that to be waste which is so in the real and not in a technical sense of the term.

The distinction between waste and trespass consists in the former being the abuse or the destructive use of property by one who, while not possessed of the absolute title thereto, has yet a right to its legitimate use; trespass being an injury to property by one who has no right whatever to its use. The essential character of waste is, that the party committing it is in rightful possession and that there is a privity of title between the parties.¹ The definition above given is that of the so-called "legal" waste. "Equitable" waste according to English law is the unconscientious use of a legal power as by a tenant for life or years holding an estate created "without impeachment of waste."² The effect at law of such a clause in an instrument prior to the Judicature Act, 1873, was not only to allow a tenant for life or years to commit waste, but it was a special power permitting him to appropriate the produce of the waste to his own use. A Court of Equity, however, considered the excessive use of the legal power incident to an estate unimpeachable of waste to be inequitable and unjust and therefore controlled it. That Court, therefore, in the exercise of its jurisdiction restrained all destructive, malicious or extravagant waste,³ and the Courts in India would no doubt, if called upon to do so, proceed upon the same principles should the occasion arise. Legal

¹ Kerr, *Inj.*, 65; *High. Inj.*, § 650; Pollock on Tort, 4th Ed., 313: as to waste by destroying evidence of title, see *Doherty v. Allman*, L. R., 3 App. Cas., 726, 726, 735 (1878); *Jones v. Chappell*, L. R., 20 Eq. 542 (1875).

² "Equitable waste is defined to consist of such acts as are not

considered waste at law, being consistent with the legal rights of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance": *High. Inj.*, § 680: citing 2 Story, *Eq.*, § 915.

³ Kerr, *Inj.*, 87—97.

waste may be caused by felling timber-trees¹ by (in the case of tenants of warrens, fish ponds and the like) taking so many of the animals that the perpetuity of succession is destroyed² by digging for minerals,³ by alteration of character or bad cultivation of land,⁴ by pulling down or altering buildings or suffering them to decay,⁵ and by other like acts of an injurious or destructive character. Waste which consists in the commission of positive acts is called "voluntary" waste, whereas "permissive" waste is the suffering the tenement to lose its value or go to ruin for want of necessary repair.

Injunctions
against waste.

§ 75. The Court will in a proper case grant an Injunction restraining the commission of waste.⁶ The principles upon which the Court interferes in cases of waste are the same as those upon which it proceeds in other cases.⁷ In the first place, it is well established that, in actions brought for the express purpose of restraining waste, privity of title must exist between the parties to the action.⁸ Nextly as a general rule, the Court will not issue an Injunction to restrain waste except upon unquestioned evidence of complainant's title and where the defendant is in possession, under adverse title, the relief will be refused.⁹ Nor will the Court interfere by injunction, when complainant's title is not clear, since the relief is granted only when

¹ See Act I of 1877, s. 54, illus. (n); Kerr, *Inj.*, 56-62: as to interest and property in severed timber. *v. ib.*, 97-104. See also High, *Inj.*, §§ 671-679. Perhaps the most frequent class of cases on this head are suits to restrain waste by cutting and removing timber from estates of freehold.

² *Ib.*, 62.

³ *Ib.*, 63-68.

⁴ *Ib.*, 68-69.

⁵ *Ib.*, 70-71: as to alteration: see *Ramchandra Vasudevahet v. Babaji Kusaji*, I. L. R., 15 Bom., 73 (1890).

⁶ See Act I of 1877, s. 54, illustrations (m) and (n).

⁷ See High, *Inj.*, Ch. XI; Kerr, *Inj.*, Ch. IV.

⁸ *v. post.*

⁹ *Pillaworth v. Hoplon*, 6 Ves., 51; *Daries v. Leo*, *ib.*, 784; *Talbot v. Hope Scott*, 4 K. & J., 96.

the title is free from dispute.¹ A particular title must be shown by complainant:² and it was held that when there was grave doubt whether an action at law could be maintained for the alleged waste it was proper to refuse a temporary Injunction.³ Thirdly, waste or threat of waste must be established, and the Court will not interfere where the waste is of a trivial nature, unless an intention to commit further waste can be shown when the Court will interfere, though the first acts of waste may have been of a trivial nature. Moreover to warrant interference it is not essential that actual and serious waste should have been already committed, for the Court has jurisdiction, if a fair case of prospective injury can be made out, to interfere before waste has been actually committed. The plaintiff must show either some actual violation of his right or a sufficient ground to apprehend it. A mere statement, however, that the plaintiff apprehends that the defendant intends to commit waste (without stating any ground for it), is insufficient.⁴ When the injury complained of is susceptible of perfect pecuniary compensation, and one for which satisfaction in damages can be had,⁵ or where adequate relief may be had otherwise than by Injunction,⁶ in both of such cases the Injunction will be withheld. Lastly, the principles with regard to delay and

¹ *Lowe v. Lucey*, 1 Ir. Eq., 93; cited in High, Inj., § 651.

² *Whitelegge v. Whitelegge*, 1 Bro. C. C., 58.

³ *Lurting v. Coun*, 1 Ir. Ch., 273, cited in High, Inj., § 651. So where the question of the right to do the thing which it was sought to restrain as waste was doubtful and rested upon the construction of a statute which was doubtful, the Court refused an Injunction in the first instance: *Field v. Jackson*, Dick.,

599; cited *ib.*

⁴ High, Inj., § 655; Kerr, Inj., pp. 53, 54, and cases there cited; as to the refusal of Injunction in cases of ameliorative or trivial waste, see *Doherty v. Allman*, L. R., 3 App. Cas., 722, 724, 733.

⁵ *Cockey v. Carroll*, 4 Ind. Ch., 344 (Amer.); see Act I of 1877, s. 54.

⁶ *Montgomery v. Walker*, 36 Ga., 515 (Amer.); see Act I of 1877, s. 56, cl. i).

acquiescence are generally applicable in cases of waste. It is, however, to be noted that delay is not so prejudicial to the plaintiff in cases of waste as in other applications for Injunctions and in some cases is not material. So a person, who has been permitted to cut down half of the trees upon the land of another, can acquire no title from the negligence of the owner to cut down the remaining half. The case is however different, if the defendant has been encouraged by the acquiescence of the plaintiff to expend monies upon the property, upon the faith and understanding that no obstacle will be afterwards thrown in the way of his enjoyment.¹

Against whom
such Injunctions
will be
granted.

§ 76. Injunctions against the commission of waste will be granted against the following, amongst other persons :—

(i) Tenants for
life or years or
in tail.

The jurisdiction of equity to stay the commission of waste at the suit of the owner of the inheritance against the tenant for life or years is well established, and is frequently exercised in England, where such estates are of common occurrence. A tenant-in-tail in possession, with successive estates tail in remainder is dispunishable of both legal and equitable waste, because he may at any time bar the entail and acquire the absolute fee-simple ; so also is a tenant-in-tail with the reversion in the Crown and a tenant-in-tail under an Act of Parliament, which precludes the barring of the entail. Tenants-in-tail after possibility of issue extinct, who have been in possession, and tenants-in-fee-simple subject to an executory devise over and heirs taking by resulting trust, until the happening of the contingency, are within the principle of equitable waste

¹ Kerr. Inj., 54, 55 ; as to acquiescence, see *Nogua Misser v. Rupikun*, 1 L. R., 9 Cal., 609 (1882), cited *post* ; the utmost degree of promptitude is exacted in cases of waste

in mines owing to the peculiar nature of the property: *Parrot v. Palmer*, 3 M. & K., 635 ; *Norway v. Rowe*, 19 Ves., 159 ; *Hilton v. Lord Grimville*, Cr. & Ph., 283.

only.¹ It would serve no practical purpose, however, to further deal with these and other estates, which are peculiar to English law and almost unknown in this country.

The nature of the estate taken by Hindu female heirs (ii) Hindu female heirs, whether widows, daughters or mothers, is anomalous, if it be considered with reference to the principles of English law. It is now settled that the nature of the estate taken by a daughter or mother is the same as that of a widow, and the same principles are applicable in each of these cases. A Hindu widow's interest in the estate of her husband cannot be accurately compared to any estate known to English law. Such an estate can only be properly described as a Hindu widow's estate. It is not an absolute estate for all purposes, and it is not merely an estate for life. As the widow represents the whole inheritance, her interest is not merely that of a tenant for life. The estate may be best considered as an absolute estate subject only to certain conditions.² It is a restrained estate, not a trust-estate. The widow is entitled to the estate of her husband, to be possessed, used and enjoyed by her, as a widow of a Hindu husband dying without issue in the manner prescribed by the Hindu law.³ Where, however, she is about to deal with the property in a mode contrary to the Hindu law, in extension of her power over it, and in derogation of the rights of those who may succeed to it, the Court is (and in that case only) justified in restraining her in the use, custody, and disposition of it.⁴

¹ Kerr, *Inj.*, 75—80, 83—87.

² *Nobokishen Surmah Roy v. Harinath Surmah Roy*, 1 L. R., 10 Cal., 1107 (1884).

³ *Hurry Doss Dutt v. Rungumoney Dossee*, Sevestre, 657, 658, 659 (1851); *Hurry Doss Dutt v. Sm.*

Uppurnah Dossee, 6 M. I. A., 439 (1856).

⁴ *Hurry Doss Dutt v. Sm. Uppurnah Dossee*, Sevestre, 664a, 1856; S. C., 6 M. I. A., 433; and see *Oojulmoney Dossee v. Sagormoney Dossee*, Sevestre, 663,

The nature of the estate of the female heir offers no bar whatever to restraining her by Injunction from waste or from any improper alienation. Hindu female heirs in possession of the inheritance (whether widow, daughter or mother) may be restrained from committing acts in the nature of waste, at the suit of the reversionary heir, or the person next in succession.¹ It is not, however, sufficient to say that there is one person entitled in possession, and another entitled in remainder in order to induce the Court to interfere to take the property out of the hands of the individual, who is in possession of it; but it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere.² An action against the heir in possession is only maintainable in respect of some act of hers which is injurious to the reversioner. The latter may sue for an Injunction to restrain acts which diminish the value of the estate—"what will amount to waste has never been discussed. Probably no assistance upon this point could be obtained from an examination of the English cases in regard to tenants for life. The female heir is, for all purposes of beneficial enjoyment, full and complete owner. She would, as I conceive, have a full right to cut timber, open mines and the like, provided she did so for the purpose of enjoying the estate and not of injuring the reversion."³ "The remedy should not extend beyond the mischief. The remedy must not be confounded

664 (1850) ["It is not easy to apply English law to native estates. A Hindu widow's estate is peculiar; it would be a mischievous doctrine to hold that she may commit waste"] per Peel, C. J.

¹ *Hurry Doss Dutt v. Rungumoney Dossee*, Serestre, 657, 660, 661

(1851). Act I of 1877, s. 54, illus. (m).

² *Hurry Doss Dutt v. Sm. Upurnah Dossee*, 6 M. I. A., 446 (1856).

³ Mayne's Hindu Law, § 600; *Subba Reddi v. Chengalamma*, I. L. R., 22 Mad., 126, 129, 130 (1898).

with that of a *cestui que trust*, or a trustee to bring back the trust-estate to its proper custody. The Hindu female is rather in the position of an heir taking by descent, until a contingency happens, than an heir or devisee upon a trust by implication. Therefore a bill filed by the presumptive heir in succession against the immediate heir, who has succeeded by inheritance, must show a case approaching to spoliation, must enable the Court to see that there is probable ground for apprehending that, unless an Injunction be granted to restrain some threatened or intending act, ultimate loss to the heirs, who may come into possession by succession, will ensue. It is not enough to make out that some gift has been made or some disposition taken place, or that such is about to be made or to take place which the law would not support; the estate of the female owner, her own personal estate, might be large and adequate to repay ten times over the alleged spoliation, and there might not be the remotest prospect of loss and the thing alienated might have no specific peculiar value."¹ The female heir "must appear not merely to be using, but abusing, her estate. Therefore, specific acts of waste, or of mismanagement or other misconduct, must be alleged and proved. Unless this is done, the female heir can neither be prevented from getting the property into her possession, nor from retaining it in her hands, nor compelled to give security for it, nor can any orders be given her by anticipation as to the mode in which she is to use or invest it. But where such a case is made out, the heiress will be restrained from the act complained of. In a very gross case, she may even be deprived of the management of the estate, and a

¹ *Hurry Dass Dutt v. Rungun-* (1851), per Sir Lawrence Peel, C.J.
mon-y Dassce, Sevestre, 657, 661

Receiver appointed."¹ A Hindu widow, governed by the Dayabhaga school, has, in regard to moveable property inherited by her from a male, the same powers and is subject to the same restrictions in respect of management and alienation, as immoveable property similarly inherited by her. A Hindu widow governed by the Dayabhaga school, inheriting her husband's share in joint properties, is entitled to claim partition of the properties, both moveable and immoveable, as against her husband's co-parceners; but if there be a reasonable apprehension of waste by her of the moveable properties allotted to her share, sufficient provision should be made in the final decree for partition, for the prevention of such waste, to safeguard the interests of the reversioners. The remedy of the latter is not necessarily confined to a subsequent suit for Injunction or a *bill quia timet*.² The reversioners will, of course, be equally entitled to restrain the unlawful acts of persons holding under the heiress.³ In further protection of his rights a reversioner may sue to declare that an adoption by a widow is invalid,⁴ and to set aside so much of an alienation as would operate against himself, though a suit to restrain all alienations would not be maintainable.⁵ As to the persons who may sue for an Injunction, see *post*.

(iii) Landlord and Tenant.

Inasmuch as the Transfer of Property Act does not apply to leases for agricultural purposes,⁶ but to leases

¹ Mayne's Hindu Law, § 600. Improper destruction of property may be anticipated from present conduct: *Durga Nath Pramanik v. Chindamani Dass*, 1. L. R., 31 Cal., 214, 221 (1903).

² *Durga Nath Pramanik v. Chindamani Dass*, 1. L. R., 31 Cal., 214 (1903).

³ Mayne, § 600.

⁴ *Ib.*, §§ 601—603.

⁵ *Ib.*, § 604.

⁶ Act IV of 1882, s. 117; a lease of a coffee-garden is not an agricultural lease within the meaning of this section; *Kunhayen Haji v. Majan*, 1. L. R., 17 Mad., 98 (1893).

for other purposes only, and as in this country and in Bengal there has always been a very considerable distinction between land held for agricultural purposes, and land held for other or non-agricultural purposes,¹ that distinction has been preserved in this Chapter and the decisions relating to the one class of leases have been separately considered from those relating to the other class.

A landlord may sue for an Injunction, non-mandatory or mandatory, restraining the commission of waste by his tenant.² As between landlord and tenant no length of abuse will give the tenant a right to commit waste. The allowance of the abuse is only by the permission of the landlord, and can never be turned against him by the tenant, whose rights are only to be ascertained by the lease.³ It has been said that there is a distinction in the general principles upon which the Court proceeds in restraining acts of waste done in violation of an express agreement from those on which it proceeds in restraining acts of pure waste at common law; that in restraining pure waste, irrespectively of agreement, the Court proceeds upon the ground of irreparable damage, and will not interfere, if the damage be small: whilst in restraining acts of waste in breach of covenants the Court proceeds upon the principle that where a positive stipulation has been entered into between two parties, either party has a right to insist upon its literal performance by the other, irrespectively of the question of damage.⁴ It is,

¹ Per Field, J., in *Prosunno Coommar Chatterjee v. Jagun Nath By-sack*, 10 C. L. R., 26 (1881).

² Where a Receiver has been appointed, the Receiver may have an Injunction to restrain tenants or under-tenants for committing

waste. Kerr, Inj., 83.

³ Kerr, Inj. [citing *Lord Courtown v. Ward* (Sch. & L., 8)].

⁴ Kerr, Inj., 82, 83; and as to acts contrary to covenants in lease, see *ib.*, 440.

however, apprehended that in this country both class of cases will be alike governed by the principles contained in section 54 of the Specific Relief Act, and that both in the case of the breach of express covenants,¹ and of the implied duty² of a tenant, the Court will, in determining the question of the right to an Injunction, consider the question of damage. The Courts will be disposed to place a liberal interpretation on the rights of the tenant,³ and will not interfere at all where the damage is small, and will not interfere by Injunction except where the damage is serious, and the principles enacted by the Specific Relief Act warrant such interference. It is, therefore, doubtful whether in this country the Courts will except from this general rule express covenants, and will insist upon their literal performance irrespective of damage. See however *post*.

Rules of English law and decisions of English Courts may be referred to with advantage in the case of waste by non-agricultural tenants, but in other cases such rules and decisions will not prove to be of special assistance or general applicability in this country where both the nature of the climate and soil, the course of husbandry, and the nature of the tenures under which land is held, differ in most material respects from the state of things which exist in England.⁴ There have been, however, numerous decisions by the Courts of this country touching the question of the obligations of tenants in this regard, and it is to these that recourse must be had for the ascertainment of the law governing the subject.

¹ In *Monindro Chunder Sircar v. Moneruddeen Biswas*, 11 B. L. R., 40 (1873), there was an express covenant, but no mention is made as to damage suffered.

² Cf. *Noyna Misser v. Rupikun*,

I. L. R., 9 Cal., 609, 611 (1882).

³ See *Lal Sahoo v. Deo Narain Singh*, I. L. R., 3 Cal., 781 (1878).

⁴ See *Tarinee Churn Bose v. Ramjee Pal*, 23 W. R., 299 (1875).

A landlord, though he has parted with the possession,¹ (a) Agricultural lease. has still an interest in the land, which he has a right to protect.¹ It is no objection to the granting of an Injunction that the landlord may not be entitled to *khas* possession.² Though a landlord may have no interest left in the land, but the right to receive the rent and to sell the tenure in default of payment of rent, he is yet fully at liberty to protect the land from damage or injury, and to prevent any use of it by which its permanent usefulness is impaired or endangered.³ A tenant by virtue of his demise does not obtain any other dominion over the land than is consistent with the contract under which it is held.⁴ Where there is no express covenant as to the user of the land there is nevertheless an implied agreement that the land shall be retained substantially in the same condition in which it was at the time of the demise; that the land shall be used for the purposes for which it was granted; and that there shall not be a complete change in the mode of enjoyment.⁵ The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to use agricultural land in a husband-like manner according to the custom of the country where the premises are situated, unless the lease or agreement contain some express covenants inconsistent with such custom and sufficient to exclude it.⁶

¹ *Tarini Charan Bose v. Debnarayan Mistri*, 8 B. L. R., App. 69, 71 (1872); *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 611 (1882).

² *Tarini Charan Bose v. Debnarayan Mistri*, 8 B. L. R., App. 71 (1871); but see *Lootf Ali v. Shib Dyal Singh*, 8 W. R., 512 (1867); which decision has not however been followed in later cases. *Ramanadhan v. Zemindar of Ramnad*,

I. L. R., 16 Mad., 407, 409 (1893).

³ *Nicholl v. Tarinee Churn Bose*, 23 W. R., 299, 300 (1875).

⁴ *Lal Sahoo v. Deo Narain Singh*, I. L. R., 3 Cal., 781 (1878).

⁵ *Ib.*; *Noyna Misser v. Rupikun*, I. L. R. 9 Cal., 609, 611 (1882).

⁶ Kerr, *Inj.*, 69, 82. As to raiyats with occupancy-rights, see *Venkayya v. Ramasami*, I. L. R., 22 Mad., 43 (1898).

So if *A* lets certain arable lands to *B* for purposes of husbandry, but without any express contract as to the mode of cultivation; and if, contrary to the mode of cultivation customary in the district, *B* threatens to sow the land with seed injurious thereto, and requiring many years to eradicate, *A* may sue for an Injunction to restrain *B* from sowing the lands in contravention of his implied contract to use them in a husband-like manner.¹

A tenant has not the right to alter the character of the land which he holds in such a way as to permanently injure the interests of the landlord in the land. It has been held by the Allahabad High Court that under section 93 (b), Act XII of 1881 (the N.-W. P. Rent Act), an act done by a tenant "detrimental to the land" means an act which injures the land itself. And "an act inconsistent with the purpose for which the land was let" means some such act as the making of a tank, or the altering the character of the land, as for instance turning it from agricultural land to building-land.² Therefore, a mortgage of his holding by an occupancy-tenant, under which the mortgagee obtains possession is not "an act detrimental to the land" or "inconsistent with the purpose for which the land was let," within the meaning of the clause and section of the Act abovementioned.³ No tenant taking land is entitled, without some specific agreement on the subject, to

¹ Act I of 1877, s. 54, illus. k; but the merely allowing the land to be waste would not of itself determine the tenancy: though such procedure on the part of the tenant would under some circumstances be evidence of an intention to abandon the holding: *Adiveru Dinabandhu Patrudu v. Lokanadhasami*, I. L. R., 6 Mad., 322 (1882); *Narasimma*

v. Lakshmana, I. L. R., 13 Mad., 124, 127 (1889).

² *Nayna Misser v. Rupikun*, I. L. R., 9 Cal., 611 (1882); *Lakshmana v. Rymachandra*, I. L. R., 10 Mad., 351, 353 (1887).

³ *Madho Lal v. Sheo Prasad Misr*, I. L. R., 12 All., 419 (1889).

⁴ *Ib.*

change the nature of that land, from what it was when he got it, or to make any permanent alteration in the state of the landlord's property. If a person wishes to lease lands for a particular purpose and to alter the character of the land, such alteration should be the subject of a special agreement between the parties in the same way as when parties take lands for building-purposes.¹ A tenant may be guilty of a breach of duty in the use of his land in various ways, as by building upon it improperly, by excavating it, by improper dealing in the matter of trees, by changing the character of the cultivation or by other acts of a similar nature.² A tenant who alters the character of the land in such a way as to permanently injure the interests of the landlord, commits a wrong in respect of which a suit for damages will undoubtedly lie,³ and which will be restrained by Injunction in proper cases. So tenants have been restrained by Injunction from building,⁴ excavating the soil, as for tanks,⁵ brickmaking,⁶ or the like; planting or cutting down trees,⁷ changing the course of husbandry,⁸ as by turning cultivated land

¹ *Anundcoomar Mookerjee v. Bissonath Banerjee*, 17 W. R., 416 (1872).

² *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 610 (1882).

³ *Ib.*, 611; *Kadumbinee Dabee v. Nobeen Chunder Adukh*, 2 W. R., 157 (1865).

⁴ *Lal Sahoo v. Deo Narain Singh*, I. L. R., 3 Cal., 781 (1878); *Bholai v. Rajah of Bansai*, I. L. R., 4 All., 174 (1881); *Madho Lal v. Sheo Prasad Misser*, I. L. R., 12 All., 419 (1889); *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 609 (1882); *Prosunno Coomar Chatterjee v. Jagun Nath Bysack*, 10 C. L. R., 25 (1881); *Jugut Chunder Roy Chowdhary v. Esahan Chunder Banerjee*, 24 W. R.,

220 (1875).

⁵ *Anath Nath Dey v. A. B. Macintosh*, 8 B. L. R., 60, 69 (1871); *Madho Lal v. Sheo Prasad Misser*, I. L. R., 12 All., 419 (1889); *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 609 (1882).

⁶ *Anund Coomar Mookerjee v. Bissonath Banerjee*, 17 W. R., 416 (1872); *Nicholl v. Tarinee Churn Bose*, 23 W. R., 298 (1875).

⁷ *Bholai v. Rajah of Bansai*, I. L. R., 4 All., 174 (1881); *Lakshmana v. Ramachandra*, I. L. R., 10 Mad., 351 (1887); *Nathan v. Kamla Kuar*, I. L. R., 13 All., 572 (1891).

⁸ *Lakshmana v. Ramachandra*, I. L. R., 10 Mad., 351 (1887); *Noyna*

into a mango-grove,¹ or paddy-land into garden-land.² and tenants will be restrained from in any other manner injuriously changing the character of the land or the user for which it was granted. For any permanent alteration of the character of land, such as the conversion of pasture into arable land, or arable land into wood, or meadow into an orchard, is waste, even although the value of the land be increased because it not only changes the course of husbandry, but affects the proof of title. But a mere temporary alteration in the ordinary and reasonable course of husbandry is not waste.³ Local custom, however, may authorize acts which would otherwise be unlawful.⁴

Though a landlord may be entitled to damages, delay or acquiescence or other circumstances in the case may disentitle him to relief by Injunction. So, where the tenant of an agricultural holding planted his *jote* with mango-trees to the knowledge, but without the consent of his landlord, thus changing the character of the land and more than three years afterwards the landlord sued for a mandatory Injunction to have the mango-trees removed, it was *held* that, having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to the Injunction sought, and as there was no claim for damages, the suit was dismissed with costs.⁵ Though, if waste has already been committed and there has been acquiescence

Misser v. Rupikun, 1 L. R., 9 Cal., 609 (1882); *Kunhamed v. Narayan Musaad*, 1 L. R., 12 Mad., 320 (1888).

¹ *Lakshmana v. Ramachandra*, 1 L. R., 10 Mad., 351 (1887).

² *Kunhamed v. Narayan Musaad*, 1 L. R., 12 Mad., 320 (1888).

³ Kerr, Inj., 68.

⁴ *Lakshmana v. Ramachandra*, 1 L. R., 10 Mad., 351 (1887); *Tarini Charan Bose v. Debnarayan Mishri*, 8 B. L. R., Ap., 69 (1871).

⁵ *Nayna Misser v. Rupikun*, 1 L. R., 9 Cal., 609 (1882).

or delay on the part of the landlord, the Court will refuse an Injunction to restore the land to its original state;¹ yet though the Court may so refuse to restore the land to its original condition, and so alter the new order of things, if it appear that the manner of use to which it is put under that order causes damage other than that which may be said to be involved in the mere change, the Court will interfere by Injunction to protect the landlord's interests.² Some decisions relating to particular acts of waste in respect of (a) buildings, (b) excavations, (c) trees and (d) cultivation, are here cited in illustration of the application of the foregoing principles.

Improperly building on land, as by building on agricultural land, or land let for the purpose of arboriculture³ is an act detrimental to the land⁴ and a wrong entitling the landlord to relief by damages or an Injunction.⁵ In the case of land let for agricultural purposes, the act of turning it into building land would be an act inconsistent with the purpose for which it was let.⁶ A ryot who relies upon an occupancy-right, must be taken as thereby admitting that the letting was of such a character as is contemplated in B. Act VIII of 1869, which applies to agricultural holdings only. If, then, the land was let on the understanding that it was to be used for cultivation, the fact that the ryot has acquired a right of occupancy does not alter any of the terms of the letting except the conditions (if any) fixing a term for the tenancy.

¹ *Ib.*

² *Nicholl v. Tarinee Churn Bose*, 23 W. R., 299, 300 (1875).

³ *Kunhamed v. Narayanan Musad*, 1. L. R., 12 Mad., 320, 323, note (1888).

⁴ *Bholai v. Rajah of Bansi*, 1. L. R., 4 All., 176 (1881); *Madho*

Lal v. Sheo Prasad, 1. L. R., 12 All., 419 (1889); *Jugut Chunder Roy v. Eshan Chunder Banerjee*, 24 W. R., 220 (1875).

⁵ *Noyya Misser v. Rupikun*, 1. L. R., 9 Cal., 609, 611 (1882).

⁶ *Madho Lal v. Sheo Prasad Misser*, 1. L. R., 12 All., 422 (1889).

The statutory right of occupancy will not be extended so as to make it include complete dominion over the land subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purpose for which it was granted, and although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment. And, if such a tenant builds upon the land, he will be restrained by Injunction from doing so and compelled to remove the building, if erected.¹ This case is an authority only for the proposition that where land is still in a state of agriculture a tenant has no right without his landlord's consent to alter the agricultural nature and use of the land. But when that use has been already changed and a large portion of the land is no longer agricultural, but used for tanks and gardens, the rule laid down by that case will not apply. An occupancy-tenant may, in such case, build a *pucca* house upon his land, and the building of such a house upon land which has ceased to be agricultural can only have the effect of improving the value of the property and giving the landlord a better security for his rent.² An occupancy-raiyat has a right to erect as a dwelling-house a building consisting of masonry walls with a corrugated iron roof on the site of his ancestor's dwelling-house within the homestead land of the holding; there is nothing in sections 23 and 76 of the Bengal Tenancy Act to prevent him from doing so: nor is there anything

¹ *Lal Sahoo v. Deo Narain Singh*, I. L. R., 3 Cal., 781 (1878).

² *Prosunno Coomar Chatterjee v. Jagun Nath Bysack*, 10 C. L. R., 25, 30 (1881); but see *ib.*, 26, 27, *per* Field, J. In *Nyamuloolah Ostagur v. Gobind Churn Dutt*, 6 W. R., Act X. 40 (1866), an occupancy-tenant's

right in this respect was laid down in terms which have been followed in recent cases: see note *Ramanadhan v. Zamindar of Ramnad*, I. L. R., 16 Mad., 407, 409 (1893); *Hari Kisore v. Barada Kisore*, I. L. R., 31 Cal., 1014 1018 1019 (1904).

in section 76 of that Act to indicate that a suitable dwelling-house of an occupancy-raiyat as described in that section must be of a temporary description only.¹ A transferee of a tenant's interest even though he be a co-sharer is under the same obligations in this respect as was his transferor. Though ryots having rights of occupancy-land for agricultural purposes may have the right to transfer them to any person to hold for the same purpose, that will not enable a person who may be desirous of erecting a large house in the midst of an agricultural *mehal* to buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling-house and appurtenances.² *A fortiori* where a lessee has expressly covenanted that he should not do a particular act on the land, he cannot avoid his obligation by parting with his interest: his sub-lessees will take the land subject to his covenant, and if they act in breach of it, an action for damages and an Injunction will lie against them.³

Acquiescence and delay will, however, bar the right to an Injunction.⁴

In a recent suit for an Injunction compelling the defendant to remove a certain building erected by him on land which he held from the plaintiff as an agricultural holding and to restrain him from altering the character of the land, it appeared that the defendant had occupancy-rights in the land in question, which formed part of the plaintiff's zamindari, and that the land had been used for agricultural purposes merely up to recent date, when the

¹ *Hari Kisore v. Barada Kisore*.
I. L. R. 31 Cal., 1024 (1904), s.c. 8
C. W. N., 754.

² *Juggut Chander Roy Choudhry*
v. Eshan Chunder Banerjee, 24 W.
R., 220 (1875).

³ *Monindro Chunder Sircar v.*
Monceeruddeen Biswas, 11 B. L. R.,
App., 40 (1873).

⁴ *Noyna Misser v. Rupikun*,
I. L. R., 9 Cal., 609 (1882).

defendant erected a building which was in no way connected with agricultural purposes, but was intended to be used either as a dwelling-house or as a pleasure-house. It was admitted that the defendant had an occupancy-right. It was held upon a consideration of most of the preceding authorities that "It is a settled rule of law that no tenant, whether he has an occupancy-right or not, is at liberty to erect houses upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding. Every such tenant is under an implied obligation to do no act which is not consistent with the purpose for which the land was originally let for cultivation. That this was the law administered in this country is also clear from the cases cited by the District Munsiff, and from the decisions of this Court.¹ It is argued by appellant's pleader, that the cases referred to relate to tenancies from year to year or for a term of years and not to tenants, who have occupancy-rights. The principle on which those cases were decided is that in an agricultural holding the tenant is under an obligation not to alter the character of the holding and that the landlord is entitled to insist upon the tenant abstaining from doing anything inconsistent with the purpose for which the land was originally let. The appellants' pleader draws our attention to *Jones v. Chappell*² and to *Doherty v. Allman*.³ These are cases relating to leases of houses and not to agricultural holdings, and they are therefore not in point.

¹ *Jugat Chunder Roy Chowdhry v. Eshan Chunder Banerjee*, 24 W. R., 220 (1875); *Tarini Charan Bose v. Debnarayan Mistri*, 8 B. L. R., p. 69 (1871); *Lal Sahoo v. Deo Narain Singh*, I. L. R., 3 Cal., 781 (1878) [see *Nayna Misser v. Rupikun*, I. L. R., 9 Cal., 609 (1882)]; *Bholai v. Rajah of Bansi*, I. L. R., 4 All., 174

(1881); *Madho Lal v. Sheo Prasad Mier*, I. L. R., 12 All., 419 (1889); *Lakshmana v. Ramachandra*, I. L. R., 10 Mad., 351 (1887); *Kunhammed v. Narayanan Mussad*, I. L. R., 12 Mad., 320 (1888).

² I. R., 20 Eq., 539.

³ I. L. R., 5 App. Cas., 709.

On the other hand, *Meux v. Cobley*¹ is a case in point as illustrating the principle which regulates the rights of tenants having agricultural holdings. It is there distinctly laid down that the question on which the decision should rest in such a case as this is whether the act done by the tenant is consistent with the purpose for which the land was demised.²

In the absence of proof of the nature of his tenure, or a local custom, giving tenants the right to dig tanks without the consent of the landlord, it is for the tenant to show that the digging a tank is a fair and reasonable use of the land which he holds—a use which will not be to the material detriment of the zemindar.³ In the absence of such proof a landlord will in an otherwise proper case, be entitled to a mandatory Injunction ordering that the tank shall be filled up and the land restored to its original condition.⁴ Where there has been an express covenant not to excavate a tank an action for damages and an Injunction will lie against the lessee and, if he has parted with his interest, against his sub-lessees.⁵ In the case of land let for agricultural purposes the making of a tank would be an act inconsistent with the purpose for which the land was let.⁶ But the digging of a well is not an act detrimental to the land or inconsistent with the purposes for which it was let.⁷ The granting of an Injunction in this case also will be subject to the question whether there

¹ L. R. (1892), 2 Ch. D., 253.

² *Ramanadhan v. Zamindar of Ramnad*, I. L. R., 16 Mad., 407, 408, 409 (1893); followed in *Bhupathi v. Rajah Rangayya Appa Rau*, I. L. R., 17 Mad., 54, 58 (1893).

³ *Anath Nath Day v. A. B. Macbintosh*, 8 B. L. R., App., 69 (1871).

⁴ *Ib.*; *Noyya Misser v. Rupikun*, I. L. R., 9 Cal., 609 (1882); *Madho*

Lal v. Sheo Prasad Misr, I. L. R., 12 All., 422 (1889).

⁵ *Monindra Chunder Sircar v. Monceruddin Biswas*, 11 B. L. R., App., 40 (1873).

⁶ *Madho Lal v. Sheo Prasad Misr*, I. L. R., 12 All., 422 (1889).

⁷ *Bholai v. Rajah of Bansi*, I. L. R., 4 All., 176 (1881).

(ii) Excavations.

has been delay or acquiescence proved¹ It is no objection to an order being made that the plaintiff is not entitled to *khas* possession. The plaintiff may not be so entitled, but he retains a certain interest in the land which entitles him to ask that the injury done to his property may be removed, which may be done more easily at the date of suit than thereafter.² The excavation of the land for the purpose of brick-making is waste. If a person wishes to lease land for the purpose of making bricks that should be the subject of a special agreement between the parties in the same way as when parties take lands for building purposes.³ But where the brick-making does not involve any waste or injury, no Injunction will be granted: as where brick-making has been carried on for more than 25 years on the land with the acquiescence of the landlord and there being no trace of any other mode of enjoyment, it cannot be said that the land has been diverted from its original destination.⁴ In a suit brought by a landlord against a tenant where the primary relief sought was a mandatory Injunction, directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy and to pay damages, and where the secondary relief sought was ejectment it was held that the suit was barred, inasmuch as it was brought more than two years after the excavation of the tank.⁵

(iii) Trees.

To change (in the absence of local custom) the character of agricultural land by planting trees as by the conversion

¹ *Noyna Misser v. Rupikun*, 1. L. R., 9 Cal., 609 (1892).

² *Anath Nath Dey v. A. B. Mackintosh*, 8 B. L. R., App. 71 (1871).

³ *Anund Coomar Mookerjee v. Bissonath Banerjee*, 17 W. R., 416 (1872); *Kadumbinee Dabee v. Nobeen Chunder Adukh*, 2 W. R., 157 (1868).

⁴ *Nicholl v. Tarinee Churn Bow*, 23 W. R., 298 (1875); distinguishing *Anund Coomar Mookerjee v. Bissonath Banerjee*, 17 W. R., 416 (1872).

⁵ *Sharoop Dass Mondul v. Joggesur Roy Choudhry*, 1. L. R., 28 Cal., 564 (1899).

of land under cultivation into a mango-grove¹ or planting land let for wet cultivation with jack, cocoanut and areca-nut trees² is an act of waste in respect of which an Injunction will be granted. It is an act detrimental to the land and inconsistent with the purposes for which it was let.³ A tenant is entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him, provided that there is no contract or custom to the contrary.⁴ The property in trees growing on land is, by the general law, vested in the proprietor of the land, subject, of course, to any custom to the contrary. Under section 23 of the Bengal Tenancy Act, the onus is on the landlord to show that a tenant with occupancy-right is debarred from cutting down the trees on the land, and not on the tenant to prove a custom giving him the right to do so. The right to appropriate them when cut down, however, is a different question. In a suit by landlords against their tenants who had a right of occupancy for appropriating some mango-trees growing on their land which they had cut down, it was *held* that the *onus* was rightly thrown on the tenants of proving a custom they alleged, giving them the right to sell the trees, and on failure to prove such custom, they were liable to damages for so appropriating them.⁵ Where there is a custom that zemindars have a right to one-fourth of the value of trees cut down by ryots without their consent or permission that implies that the

¹ *Lakshmana v. Ramchandra*, I. L. R., 10 Mad., 351 (1887).

² *Kunhamed v. Narayanan Musond*, I. L. R., 12 Mad., 320 (1888).

³ *Bholai v. Rajah of Bansi*, I. L. R., 4 All., 176 (1881).

⁴ *Nathan v. Kamla Kuar*, I. L. R.,

13 All., 572 (1891).

⁵ *Najur Chundra Pal Chowdhuri v. Ram Lal Pal*, I. L. R., 22 Cal., 742 (1894); see cases therein cited, and *Mon Mohinee Goopla v. Raghoonath Misser*, I. L. R., 23 Cal., 209, 210 (1895).

ryots have a right to cut down the trees and an Injunction restraining them cannot be granted.¹ The trees upon an occupancy-holding, whether planted by the tenant himself or not, belong and attach to such holding and like it are not susceptible of transfer by the tenant.² When a proprietor sells his rights and becomes entitled under section 7 of the N.-W. P. Rent Act to the rights of an ex-proprietary tenant, he holds all rights in the land, *qua* such tenant, which he formerly held in his character as proprietor, of course, paying rent in his capacity as tenant. Where there are trees upon the *sir* land held by him at the time when he lost his proprietary rights, neither the purchaser of those rights nor he himself can cut down or sell them *in invitum* to each other. Short of cutting the trees down, he has the same right to enjoy the trees as he originally had.³ Where a defendant who held from the plaintiff irrigable land which was cultivated with paddy, etc., and who had an occupancy-right and a fixed money-rent, planted cocoanut-trees on the land, it was held that the acts of the defendant did not constitute waste or a breach of the terms of the tenancy.⁴ The same rules will apply in this as in the former cases with regard to acquiescence and delay.⁵

iv) Cultivation.

A tenant who changes the character of his cultivation in such a way as to permanently injure the interest of the landlord in the land commits a wrong for which a suit for damages or an Injunction or both will lie :⁶ as by planting land let for paddy cultivation with jack, cocoanut and

¹ *Nuffer Chunder Ghose v. Nundo Lal Gossami*, I. L. R., 22 Cal., 751 (1894), note.

² *Imdad Khatun v. Bhagirath* I. L. R., 10 All., 159 (1888).

³ *Jugal v. Deoki Nandan*, I. L. R., 9 All., 88 (1886).

⁴ *Venkayya v. Ramasami*, I. L. R., 22 Mad., 39 (1898).

⁵ *Nayna Misser v. Rupikun*, I. L. R., 9 Cal., 609 (1882).

⁶ *Nayna Misser v. Rupikun*, I. L. R., 9 Cal., 610, 611 (1882).

arecanut trees, such an alteration being unsuited to the nature of the holding and inconsistent with the purpose for which the land was demised ;¹ or planting a mango-
tope on dry land usually cultivated with a dry crop, thereby rendering it unfit for cultivation.² And it was held in the last cited case that the defendants as tenants from year to year were under the obligation to restore the land in the condition in which it was when it was leased to them, and that they were not at liberty to change the usual course of husbandry except with the consent of their landlord. The manufacture of Indigo cakes from indigo-plants is not an agricultural purpose. Where land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the purposes of the tenancy, and the landlord is entitled to a permanent Injunction restraining the tenant from erecting the factory.³ The same principles with regard to acquiescence and delay will apply as in the former cases.⁴

In the territories to which the Transfer of Property Act (IV of 1882) extends, the rules governing the relations of lessors and lessees, in the case of non-agricultural leases, are, in the absence of a contract or local usage to the contrary, contained in that Act. A lessee is bound to keep and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put into possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and

¹ *Kunhamed v. Narayanan Mussad*,
I. L. R., 12 Mad., 320 (1888).

² *Lakshmana v. Ramchandra*, I.
L. R., 10 Mad., 351 (1889).

³ *Surendra Narain Singh v. Hari
Mohan Misser*, I. L. R., 31 Cal., 174
(1903).

⁴ *Nayna Misser v. Rupikun*, *supra*.

inspect the condition thereof and give or leave notice of any defect in such condition ; and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left.¹ The phrase 'irresistible force' may be taken to include that fire, tempest, flood and violence which renders the lease voidable at the option of the lessee.²

The general rule of English law being that personal chattels once annexed to the freehold become part of it, and may not be again severed without the consent of the owner of the inheritance, it is waste if a tenant for life or years who has annexed a personal chattel to the freehold afterwards takes it away. But exceptions have been engrafted on the general rule in favour of trade-fixtures, and fixtures set up for ornament or domestic convenience. The exception, however, at Common law in favour of trade does not extend to buildings which have been let into the soil, even if used for trading purposes : though now by Statute buildings are rendered removable in certain cases.³ In India the law with regard to fixtures and the commission of waste by their removal has no importance in the case of landlords and tenants for, in the absence of a contract or local usage to the contrary, a lessee is entitled to remove at any time during the continuance of the lease *all* things which he has attached to the earth ; provided he leaves the property in the state in which he received it.⁴ Under the interpretation given to the phrase 'attached to the earth'⁵ a lessee, may remove things rooted in the earth, as in the case

¹ Act IV of 1882, s. 108, cl. (m).

² Act IV of 1882, s. 108, cl. (e) ;
see *Kunhaya Haji v. Mayan*, I. L.
R., 17 Mad., 98 (1893).

³ Kerr, Inj., 72-75.

⁴ Act IV of 1882, s. 108, cl. (A).
⁵ *Ib.*, s. 3.

of trees and shrubs, imbedded in the earth, as in the case of walls or buildings, and things attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached subject to the proviso abovementioned.

The distinctions, therefore, which exist in English law between things which are and things which are not tenant's fixtures, that is, things which he may or may not remove during his tenancy, cease to have significance in this country, in which a tenant has, as against his landlord, the complete disposal of things which he has attached to the earth and as to which therefore there can be no waste. The privilege of removal must, by the terms of the section (as also under English law in the case of removeable chattels), be exercised during the continuance of the tenancy. There is no right to come upon the land after the expiration of the lease for the purpose of their removal.

Similar rights exist with regard to emblements. When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines and to free ingress and egress to gather and carry them.¹

Buildings as already mentioned are covered by the provision contained in section 108, cl. (h) of the Transfer of Property Act, and may be removed by the tenant. The general rule of English law expressed by the maxim *quidquid plantatur solo cedit solo*, namely, that whatever is annexed to the earth becomes an accession to the freehold and irremovable has been held not to prevail in this

¹ Act IV of 1882, s. 108, cl. (i).

country outside the Presidency-towns and to be even therein subject to certain limitations.¹ The question, however, of the applicability of the maxim has become of diminished importance since the passing of the Transfer of Property Act which by section 51 secures to *bonâ fide* holders under defective titles the value of improvements made by them; and by section 108, cl. (h), enables a lessee to remove during the continuance of the tenancy all things which he has attached to the earth, including therein buildings erected by him.

The tenant must not commit acts, of voluntary waste and may be restrained by Injunction from so doing.* The lessee may use the property and its products (if any) as a person of ordinary prudence would use them, if they were his own; but he must not use or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.³ A tenant who uses the premises in a reasonable and proper manner, having regard to the purpose for which they were demised, is not liable as for waste. But he may not change the nature of the property or use it in a manner inconsistent with the purpose for which it was demised.⁴ Waste in buildings may consist either in pulling them down or suffering

¹ See *In the matter of Thakoor Chunder Paramanick*, B. L. R., Sup. Vol. F. B., 595 (1866); *Juggut Mohini Dhanee v. Dwarka Nath Bysack*, I. L. R., 8 Cal., 582 (1882); *Mahalatchmi Ammal v. Palani Chetti*, 6 Mad. H. C. R., 245 (1871); *Akileudammal v. Venkatachala Mudali* [ib. 112 (1871)]; *Russick Lall Muddack v. Lokenath Kurmohar*, I. L. R., 5 Cal., 691 (1880);

Parbulty Bewah v. Woomatara Dabee, 14 B. L. R., 201 (1874); *Dunia Lal Seal v. Gopi Nath Khetry*, I. L. R., 22 Cal., 825 (1875).

² As to permissive waste and covenant to repair, see Act IV of 1882, s. 108 cl. (m); Kerr, *Inj.*, 71, 72.

³ Act IV of 1882, cl. (o).

⁴ See cases cited, *ante*, with respect to non-agricultural leases.

them to go to decay. An alteration of buildings which changes their nature and character is waste.¹

A lessee for years has not, in the absence of express words, power to remove and sell the soil, except in the case of mines, quarries or pits open when he came in. To allow the opening of new quarries or mines there must be a power or liberty on that behalf, and such a power or liberty is to be usually found in every quarrying or mining lease.² If an indenture made subsequent to the original lease operates as a fresh demise of the premises leased in their condition at the date of the indenture and at such date there are quarries and pits open on the premises, the lessee, whatever may have been his original rights, is entitled to continue to work them. But, if there be a mere confirmation of the original lease, it will not operate so as to make the estate confirmed subject to the incidents which it would have had if granted in its condition at the date of the confirmation.³

A lessee must not, without the lessor's consent, erect on the property any permanent structure except for agricultural purposes.⁴ So it was held prior to the passing of the Transfer of Property Act that a tenant of non-agricultural land having nothing in the nature of a protected and permanent tenure or holding therein was not entitled to erect *pucca* buildings without the consent, and against the wishes of the landlord, on such land, and might be restrained by Injunction from erecting such buildings.⁵ This is not, however, the law in England,

¹ Kerr, Inj., 70; *Ramchandra Farsudevshet v. Babaji Kusaji*, I. L. R., 15 Bom., 73 (1890). See *Doherty v. Allman*, 3 App. Cas., 709.

² *In re Purmanandas v. Jeewandas*, I. L. R., 7 Bom., 109, 116, 117 (1882).

³ *Ib.*, 117, 118.

⁴ Act IV of 1882, s. 108, cl. (p).

⁵ *Jagannath Baisak v. Prosonno Coumar Chatterjee*, 9 C. L. R., 221 (1881); this decision was reversed on appeal as it was held that the defendants were entitled to a right of occupancy, 10 C. L. R., 25 (1881).

for, unless it can be shown that such building is an injury to the inheritance, the lessee of land who erects a building thereon without the consent of his lessor does not commit waste. A tenant may therefore in that country lawfully erect buildings, which improve the value of the land.¹

Although it may be proved that the tenant has altered the character of the land so as permanently to injure the interest of the landlord, or has otherwise committed a breach of his duties towards him, it does not follow that in all cases the latter will have a remedy by Injunction. For, by standing by and allowing the tenant to go on with the work without objection, he may disentitle himself to the assistance of the Court.² Further as the granting of an Injunction is an act depending upon the discretion of the Court, that discretion will be exercised with regard to all the circumstances of the case—the covenants (if any) entered into by the parties, their relative interests, the length of the demise, the nature of the property and the waste complained of.³ If there be a covenant touching the performance or non-performance of an act, an Injunction will issue against the breach of covenant. If there should be no ground for interposing by reason of a breach of contract, there may still, however, be grounds for interposing on the ground of waste.⁴ Where there is breach of an express covenant it was said in the case now cited that there is no question of convenience or amount of damage.⁵ As, however, observed in

¹ *Jones v. Chappell*, L. R., 20 Eq., 539; neither this case nor that of *Doherty v. Allman*, L. R., 5 App. Cas., 709, have any application to agricultural holdings; *Ramanadhan v. Zamindar of Ramnad*, I. L. R., 16 Mad., 409 (1893).

² Act I of 1877, s. 56; *Noyne v. Maser v. Rupikun*, I. L. R., 9 Cal., 609, 610 (1882).

³ See *Doherty v. Allman*, 3 App. Cas., 709.

⁴ *Ib.*, 718.

⁵ *Ib.*, 720.

preceding portions of this book, it would appear that under the Specific Relief Act the principles governing the issue of Injunctions in cases of contract and tort are substantially the same, and in the one case as in the other the Court will consider the amount and nature of the damage. If, however, possession of land be given upon an express bargain that a thing shall or shall not be done there, as a general rule, a Court of Equity would not do its duty, if it did not enforce the contract, because mere damages would not there afford a sufficient or adequate remedy.¹ In other words express covenants will be enforceable by Injunction not so much on the ground that the parties have so expressly contracted as for the reason that under such circumstances relief by damages will, as a general rule, not afford a sufficient or adequate remedy. Should the case be otherwise, it is conceived that damages will alone be given even in cases of express covenant.²

A dependant talookdar is a person holding a tenure intermediate between ryots and the zemindar, in which he has a beneficial interest, which is transferable by sale or otherwise. It was held in the case undermentioned that a zemindar cannot sue a dependant talookdar (the possessor of resumed *lakheraj* land) for confirmation of possession and for an Injunction to prevent him from committing waste. The only possession that a zemindar can obtain after a decree for resumption is a constructive one derived from the receipt of rent from the tenant. A talookdar has full power to dig tanks in his tenure, in which he holds a beneficial interest; and the act is accordingly not one of waste requiring a perpetual Injunction.³

¹ *Doherty v. Allman*, *ib* at p. 729.
per Lord Blackburn.

² See *ib.* at p. 731.

³ *Mugnee Ram Choudhry v. Baboo*

Gunesh Dutt Singh, W. R. (1864), 275 ;
see *Nicholl v. Tarinee Churn Bose*, 23
W. R., 290, 300 (1875).

(iv) Dependant
talookdar.

(v) Mortgagor
and mortgagee.

The mortgagor in possession, although he may exercise all acts of ownership, even to the extent of committing waste, which does not impair the security,¹ will nevertheless, be restrained from such acts as depreciate the value of the premises and render the security insufficient. The principle upon which the interference is based as against a mortgagor in possession is the right of the mortgagee to his whole security unimpaired during the life of the mortgage.² In conformity with the English rule above stated the Transfer of Property Act provides³ that a mortgagor in possession of a mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is or will be rendered insufficient by such act. A security is deemed to be insufficient within the meaning of this section, unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.⁴

A mortgagee in possession must not commit any act which is destructive or permanently injurious to the property.⁵ He is thus not liable for loss that arises from accidental causes. He must use the mortgaged property with the care of a prudent owner. If the security is insufficient, he is entitled, so long as he is acting *bonâ fide*, to make the most of the property for the purpose of

¹ *Kekewich v. Marker*, 3 Mac. & G., 329.

² *v. ante*, § 61 "Waste"; High, Inj., §§ 693, 694, 478, *et seq.*; Kerr, Inj., 81, 82: the same principles apply to mortgages of chattels: High, Inj., § 695; as to the meaning of "insufficient" see *King v. Smith*, 2 Ha., 244, and s. 66, Act IV of 1882 (Transfer of Property).

³ Act IV of 1882, s. 66. Similarly under s. 10 of the Easements Act he is not at liberty to impose upon the mortgaged property any easement, which renders the security insufficient.

⁴ The same proportion is fixed in s. 6 of Act II of 1882 (Trusts).

⁵ Act IV of 1882, s. 76, cl. (c).

discharging what is due to him as by cutting timber, opening mines and the like, but he does so at his own risk. If he incurs a loss he cannot charge it against the mortgagor, and if he obtains a profit, the whole of that profit must go in discharge of the mortgage-debt.¹

The same principles which apply in respect of waste by (vi) Vendors, purchasers and others, a mortgagor in possession are also applicable as between a purchaser who has obtained possession before the payment of the purchase-moneys and the vendor.² In the absence of a contract to the contrary, the seller is bound between the date of the contract of sale and the delivery of the property to take as much care of the property and all documents of title relating thereto, which are in his possession, as an owner of ordinary prudence would take of such property and documents.³ The same principles underlie the jurisdiction to prevent any waste which may tend to injure the security, where monies due under a settlement are unpaid:⁴ and as between the heir or executor of a debtor in possession and a judgment-creditor.⁵ Further instances in which the Court will interfere by Injunction to restrain waste are specified in Illustrations (l), (m) and (n) of section 5 of the Specific Relief Act, which deal with waste by partners,⁶ Hindu widows,⁷ and members of an undivided Hindu family⁸ respectively: and there are others. The important subject of waste and trespass by co-sharers is separately dealt with in the following paragraph.

¹ Kerr, *Inj.*, 80: v. *ante*, pp. 202-287.

² *Crockford v. Alexander*, 15 Ves., 138; *Pelley v. Eastern Counties Railway Co.*, 8 Sim. 483; *Casamajor v. Stode*, 1 Sim. & St., 391; Kerr, *Inj.*, 82.

³ Act IV of 1882 (Transfer of Property), s. 55, cl. (c); see Fry's *Specific Performance*, 3rd ed., p. 618;

Lymight v. Edward, 2 Ch. D., 510; *Phillips v. Sylvester*, L. R., 8 Ch., 173; *Egmont v. Smith*, 6 Ch. D., 469; *Clarke v. Ramuz* (1891), 2 Q. B., 456.

⁴ Kerr, *Inj.*, 82.

⁵ *Leake v. Bickell*, 1 Y. & J., 339.

⁶ v. *ante*.

⁷ v. *ante*.

⁸ v. *post*.

Waste and
trespass by
co-sharers.

§ 77. In India where co-ownership is of more common occurrence than individual and separate ownership, the subject of Injunctions as between co-sharers assumes a position of far greater importance than is accorded to it in the English text-books and requires special treatment with reference to the numerous decisions which exist upon the subject.

(i) Co-sharers.

Co-sharers may be coparceners, joint-tenants or tenants-in-common. Where lands descend on an intestacy to several persons as co-heirs the persons so inheriting are called co-parceners or tenants in co-parcenary.¹ Every joint tenancy is created by one and the same title, and joint tenants are said to be seized *per my et per tout*, i. e., *qui nihil habet et totum habet*. But they are potentially seized of aliquot parts for the purpose of alienation in severalty. Tenants-in-common are those who claim by several titles, or in several rights, though by one title, and have their possession in common.² Joint tenants have both single possession and a single joint right to possess, but tenants-in-common have a single possession with several rights to possess. When a person having a right to possess a thing acquires the physical control of it, he necessarily acquires legal possession also.³ Though in the books it is said of joint tenants only that they are seized *per my et per tout* the position seems to be equally applicable to all tenants who hold *pro indiviso* whether they are co-parceners, joint tenants or tenants-in-common. With respect to occupation and the right to occupy there

¹ Litt, §§ 241, *et seq.*; Sweet's Law Dictionary, 208.

² Comyn's Digest, Title, Estate undivided, K. 8. The term "my" signifies, not as has been often supposed, "a moiety," but "not in the least." See note to *Murray v. Hall*, 7 M. Gr. & Scott, 455.

"On dit communément que chaque jointenant n'a la propriété de rien et est propriétaire de tout; ce que veut dire qu'il tient tout conjointement et ne tient rien en particulier"; *ib.*

³ Pollock and Wright on Possession, p. 27.

Tenants in Common

Joint Tenants

is no distinction between tenants-in-common and joint-tenants.¹

Joint-tenants or tenants-in-common, when they have not parted with possession, possess in law, and may possess in fact, according to their interest as owners. If a servant holds the property on their behalf, the *de facto* possession is exercised in the name and for the use of all of them. If one of them alone holds or occupies, his physical possession is that of an owner for his own interest and that of an agent as to the others. If there is a personal joint occupation, the physical and legal possession exactly coincide. In every case there is not a plural possession, but a single possession exercised by or on behalf of several persons.² A co-parcener who purchases from a trespasser stands in his shoes and his possession is not that of a co-parcener, but that of a trespasser, as was that of him from whom he purchased.³

Owing to the peculiarity of their legal right and possession the subject of Injunctions between co-sharers requires separate treatment. Further a co-sharer is entitled to possession and may therefore not be excluded; he is also entitled to enjoyment of the property in its actual condition and is therefore entitled to be protected from waste. Inasmuch as the greater number of the reported decisions deal with the right of a co-sharer to be protected both from waste and trespass these torts have not been separately dealt with.

Upon this subject it is necessary to separately consider the questions of (1) joint user; (2) remedies in respect of the abuse of joint property. In the first place, what may a co-sharer do or not do in respect of the joint estate; (ii) Waste and trespass by co-sharers.

¹ Note to *Murray v. Hall*, 7 M. Gr. & Scott, 455; note to *Daniel v. Camplin*, 7 M. Gr., 172.

² Pollock and Wright on Possession, p. 21.

³ *Muhammad Ali Jan v. Faiz Buksh*, I. L. R., 18 All., 361 (1896).

secondly, assuming that a co-sharer has done or threatens to do that which he should not do, what remedies are open to the other co-sharers in respect of such infringement of their rights.

- a) Joint user. The acts of user may be (1) one to the profit of one co-sharer but without damage to the other co-sharers; (2) with or without profit to one co-sharer, but with damage to the other co-sharers, such wrongful user entitling either to relief by a decree for joint possession, damages or Injunction. User of the first-mentioned character is illustrated by the decision of the Privy Council in *Lachmeswar Singh v. Manowar Hossein*¹. In this case the plaintiffs and defendants were co-sharers. The defendant worked a ferry across a river at a point where it flowed through a joint *mouza*. The plaintiffs by their suit sought amongst other things a declaration that the river and ferry were within the area of the joint *mouza*, that the plaintiffs and the defendants might be declared entitled to receive the profits of the ferry in proportion to the extent of their respective shares, and that the defendants might be restrained from offering opposition to the possession of the plaintiffs. The Judges of the High Court were of opinion that the defendants were only entitled to hold possession and appropriate the profits of the ferry in proportion to their proprietary right in the *mouza*. But the Privy Council held that the defendant had made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He had not excluded any co-sharer. It was not alleged that he had used the river for passage in any such way as to interfere with the passage of other people or that there had been any obstruction at the landing places, or that he had prevented any one else from setting up a ferry. So far from inflicting any damage

¹ I. L. R., 19 Cal., 253 (1891).

upon the joint owners, the defendant had supplied them gratuitously with accommodation for passage. All that was complained of was that he had expended money in a certain use of the joint property and had thereby reaped a profit to himself. If, therefore, the defendant's use of the landing places and the river was consistent with joint possession, there was no reason why the plaintiffs should have any of the profits. They had not earned any and none had been earned by the exclusion of them from possession as was the case in the leading decision of *Watson & Co. v. Ranchand Dutt*.¹ By the defendant's acts they had lost nothing and had received some substantial convenience. Only if and when the defendant encroached upon their enjoyment of the joint property would they be entitled to relief? But upon the facts stated, they were entitled to none, and the suit was accordingly dismissed. It was *held* that property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure for that purpose, than to the others, where the latter are not excluded. Joint property being used consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers, who do not join in the work there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit. If, therefore, by the use of joint property there is a resulting profit to one sharer without loss to or exclusion of the others, there is no such use as will give ground for a suit against him. There is no infringement of right and therefore no claim to relief.

Where, on the other hand, there is wrongful exclusion or user causing damage to the co-sharers, there is an ^{(b.) Abuse of} joint property. infringement of legal right, for which the Courts will

¹ 1 L. R., 18 Cal., 10 (1890).

give relief. Though the Courts will interpose in a proper case, they will in general be cautious of interfering with the enjoyment of joint estates as between their co-owners.¹

When a party asks the Court to interfere between co-sharers, the Court will not look only at the *strict* rights of the parties, but will see what is fair and reasonable between them; and, if what has been done is neither unfair nor unreasonable then whether it be in accordance with the strict rights of the parties or not, the Court has a discretion to leave the plaintiff to his strict remedy by partition or any other remedy he can maintain.² A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights.³ The user must involve a real and substantial injury. The Court will not aid a complainant who applied upon trivial and frivolous, unreasonable or selfish grounds; or for purposes of vexation; for it is not every infringement or excess of user which will justify the interference of the Court.⁴

If, however, the user of a sharer with or without profit to himself involves a legal injury and material damage to his co-sharers, the latter may have an action against him. But the nature of the relief which will be given will vary with the nature and effect of the acts done, and the intent and purpose with, and for which, they were committed and all the circumstances proved in the particular case.

¹ *Lachmeswar Singh v. Manowar Hossein*, 1. L. R., 19 Cal., 265 (1891).

² *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80 (1875).

³ *Lala Biswambhar Lal v. Rajaram*, 3 B. L. R., App., 67 (1869), *per* Peacock, C. J.

⁴ *Mohima Chunder Ghose v. Ma-*

dhub Chunder Nag, 24 W. R., 80 (1875); *Lala Biswambhar Lal v. Rajaram*, 3 B. L. R., App., 67 (1869) [explanation of this case in *Sham-nugger Jute Factory v. Ram Narain Chatterjee*, 1. L. R., 14 Cal., 189 (1886)]; *Joy Chunder Rukhit v. Bippro Churn Rukhit*, 1. L. R., 14 Cal., 236 (1886).

Every tenant or owner in common is equally entitled to the occupation and use of the tenement or property.¹ All co-sharers may do what they like with their own, subject to the maxim "*sic utere tuo ut alienum non laedas.*" One of several co-sharers of joint undivided property is as such holder of an undivided share, until partition, the part owner of every *biga* of the whole property and by virtue of that right of ownership, he can claim either to occupy the land himself jointly with his co-sharers or their assignees or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with his assent.² As all are entitled to joint possession no one sharer can take exclusive possession of any part of the joint property to the ouster of the others or any of them.³ But property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure for that purpose, than to the others, where the latter are not excluded. Joint property being used consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit.⁴

There may be and often is together with joint possession a peculiar exclusive possession of part of the joint property for the convenience of the particular sharers and with the continuing consent of the others. The rights of the co-sharers in such a case is laid down in the judgment of

¹ Pollock, Torts, 328; Pollock and Wright on Possession, 21, 27, 87.

² *Stalkart v. Gopal Panday*, 12 B. L. R., 197, 199 (1873) per Phear J. [and see *Sheopershad Singh v. Leela Singh* 12 B. L. R., 190 note (1873)]

cited in *Lloyd v. Musamat Biber Sogra*, 25 W. R., 314 (1876).

³ *Ib.*

⁴ *Lachmeswar Singh v. Manowar Hossein*, 1. L. R., 19 Cal., 253 (1891).

Phear, J., from which the following extract is taken :—
 “In my judgment, as I understand, joint possession under Hindu law, that peculiar exclusive possession of a part of a common dwelling-house or set of dwelling-houses which one member of a family obtains very commonly without an actual partition having been come to between the members of the family is a possession which must be referred to the continuing consent of his co-sharers. So long as no actual partition is come to, either as a result of a suit, or formally between the parties themselves, or evidenced by long acknowledgment on the part of the members of the family, the possession is merely that which, for convenience’ sake, is conceded by all the members jointly to each one of them ; and it may be put an end to and a completely new arrangement come to, at any time, by the members of the family, if they think fit to make the change. As long, however, as this peculiar state of exclusive possession is allowed to remain, it seems to me that it must be taken that the acquiescing members of the family concede to the person, who has the exclusive possession, all reasonable rights of user of his separate plot, or separate portion of the dwelling-house, as is necessary for the ordinary purposes of residence, having regard, of course, to the circumstances of Hindu life. I think upon the authority of the cases (some of which have been cited) decided in this Court, we must hold that the concession on the part of the acquiescing members does not go to the extent of enabling the possessor of the dwelling-house to alter the character of the property, or to do any thing with it, which is not consistent with such user of it as might be ordinarily expected to take place. If he desires to build a new and additional structure upon a portion of the house-ground, it seems to me that he has no right to do so, and in that way materially to alter the condition of

the property without obtaining the assent of his co-sharers. If this view be correct, assuming that the plaintiffs in the present suit had an exclusive possession of the courtyard, as an adjunct to the particular portion of the dwelling-house which they occupied, I think they would not be entitled to use that courtyard otherwise than for the ordinary purposes of, and incidental to, residence in their house, without the assent and knowledge of their co-sharers."¹

Joint enjoyment of the property in its actual condition being the right of all, none may disturb that enjoyment either by directly excluding others, or by the commission of acts which have that effect,² or by acts which injuriously affect the position of the sharers by reason of material alterations³ of the character and condition of the property enjoyed made without the consent of the co-sharers.

¹ *Sheopershad Singh v. Leela Singh*, 12 B. L. R., 188, 195, 196 (1873), *per* Phear, J.

² *Sheopershad Singh v. Leela Singh*, 12 B. L. R., 197 (1873); *Nundun v. Lloyd*, 22 W. R., 74 (1874); *Macdoland v. Lalla Shib Dyal Singh Panrey*, 21 W. R., 17 (1874); a co-sharer is entitled to ask from his co-sharer to be allowed to enjoy his share of the property in any mode in which it could be enjoyed as an undivided share; and he has a right to insist that neither his co-proprietor nor anybody claiming through him should without his consent take exclusive possession of any portion of the joint property to which he has not a subsisting right of exclusive possession; *Nundun v. Lloyd*, 22 W. R., 74, 75 (1874). No one co-sharer in an undivided property has a right to possess himself of any portion of it to the exclusion

and without the authority of his co-sharers and to deal with it and cultivate it as he will without their sanction. Every co-owner of such property is entitled to take a part in determining how it shall be used unless restrained by local custom or special agreement; *Lloyd v. Musamut Bibee Sogra*, 25 W. R., 313 (1876), *per* Garth, C. J.

³ *Sheopershad Singh v. Leela Singh*, 12 B. L. R., 197 (1873); *Crowdie v. Bhikdaree Singh*, 16 W. R., 41 (1871). ["A co-sharer in landed property has no right to do anything which alters the condition of the joint property without the consent of his co-sharers. If he thinks his interest in the property might be improved by works of a particular character, he can effect a partition and improve his particular share:"] *Gooroodass Dhur v. Bepoy Gobind Bural*, 10 W. R., 171 (1868); S. C., 1 B. L. R., A. C., 108.

So destruction of the subject-matter, waste attended by substantial damage, acts which permanently alter the character and condition of the land as by building upon it, excavating tanks, or changing the nature of the cultivation¹ are acts which, if committed by a co-sharer, amount to wrongs to the other part-owners giving them a right of action in respect of their commission. There is nothing in the law of Bengal which goes to prevent an undivided shareholder from granting a lease of his share to a third person. All that the other co-proprietor can insist upon is that the lessee should be prevented from dealing with the subject of the lease in any way different from that in which the lessor, his co-proprietor, could deal with it;² and a joint shareholder or his lessee may contract with the ryots of the zemindary for any lawful purpose even without the consent of the other co-proprietors. So the ryots may be induced by contract or offer of reward to cultivate any crop upon the land they hold, provided that they are holding those lands without any covenant or stipulation in their agreement with their zemindar to cultivate them in a particular way.³

iii) Remedies
in respect of
the abuse of
joint property.

Should a co-sharer abuse the joint property, or otherwise infringe the rights of his co-sharers, the latter may avail themselves of one or other or more of the following remedies, according as the circumstances of the case may require, viz. (1) partition; (2) declaration of right, damages,

¹ *Crowdie v. Bhikdaree Singh*, 16 W. R., 41 (1871); *Macdonald v. Lalka Shib Dayal Singh Panrey*, 21 W. R., 17 (1874). One shareholder alone in a joint estate or his assignee cannot claim to cultivate any portion of the property, which is not his zeraif land exclusively without the consent of the other shareholders merely upon

the ground that he is willing to pay reasonable rent for it: *Nundun Lall v. Lloyd*, 22 W. R., 74 (1874); *Lloyd v. Musamut Bibee Sogra*, 25 W. R., 313, 314, 315 (1876).

² *Macdonald v. Lalka Shib Dayal Singh Panrey*, 21 W. R., 17 (1874).

³ *Ib.*

and account of profits; (3) decree for joint possession; (4) Injunction.

Partition which effects a severance of the joint pro- (a) Partition.
perty and allots to each sharer his share of the joint estate in severalty terminates the joint user. This remedy is available in every case and is free of any condition, such as those which effect some of the other reliefs hereinafter mentioned. By partition the parties put an end to and prevent the future occurrence of disagreement or mischief arising from the joint user. In some cases this is the only remedy available.

In those cases in which the action of one co-sharer, though not amounting to a legal injury, is not assented to by another, the only remedy is for the party to partition the land, so as that all shall hold exclusively that which represents their respective shares. The law provides the means by which common lands may be lawfully partitioned in a proceeding in which all the co-sharers will get their fair quantum of the common land, having regard to possession, quality and the amount of their shares. And, unless a plaintiff brings his case within the purview of the principles hereinafter mentioned, the Court in its discretion will leave him to his strict remedy by partition or any other remedy he can maintain.¹ A suit for partition is often the best means of settling difficulties between co-sharers, but a plaintiff's rights are not limited to that. Upon a proper case, he may be entitled to a decree for joint possession, damages and Injunction or some one or other of these reliefs.²

¹ *Lala Binsambhar Lal v. Rajaram*, 3 B. L. R., App., 67 (1869); *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80 (1875); *Joy Chunder Rukhit v. Bipro Churn Rukhit*, I. L. R., 14 Cal., 236, 239 (1886);

Shadi v. Anup Singh, I. L. R., 12 All., 436, 437 (1889); *Sheopershad Singh v. Leela Singh*, 12 B. L. R., 190 note (1871).

² *Bhaygo Mutty Bibee v. Mahomed Wasil*, 25 W. R., 315 (1876).

(b) Declaration of damages; account of profits.

Assuming that partition is not desired, other remedies not involving partition are open to the co-sharer, viz., a suit for a declaration of right, for account of profits, and damages, for joint-possession, and an Injunction.

A suit may be brought which seeks some or all of these reliefs.¹ If one co-owner of land derives gain by committing waste on the common property, he is liable to account to the other owners for their shares of the money so obtained.² Damages may be given for an infringement of right causing injury, as by wrongful cultivation,³ erection of buildings,⁴ excavations, and the like.

It may be that a sharer has in some respects interfered with the right of his co-sharer as a tenant-in-common; and it may also be that he has thereby rendered himself liable to an action for damages at the instance of that co-sharer. But the Court will not on that account alone issue an Injunction against that sharer, for the circumstances of the case may be (and in this class of cases generally are) such, that though there is an infringement of a right, the proper remedy for such infringement lies in damages.⁵

(c) Decree for joint possession.

A suit to recover possession is not maintainable against one co-sharer in respect of property still joint and undivided, the usual remedy being a suit for a partition and account;⁶ but in a proper case a suit to recover joint possession and an Injunction may be maintained.⁷ In

¹ *Bhaygo Mully Bibee v. Mahomed Wasil*, 25 W. R., 313 (1876); *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 218, 219 (1887).

² *Kerr, Inj.*, 106; *ante*, p. .

³ *Watson & Co. v. Ram Chand Dutt* I. L. R., 18 Cal., 10 (1890).

⁴ *Shamnugger Jute Factory v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 189 (1886).

⁵ *I. J. Croudy v. Inder Roy*, 18 W. R., 408 (1872); *Watson & Co. v. Ram Chand Dutt*, I. L. R., 18 Cal., 10; and both damages and an Injunction may be given; *Bhaygo Mully Bibee v. Mahomed Wasil*, 25 W. R., 313.

⁶ *Gobind Chunder Ghose v. Ram Coommar Dey*, 24 W. R., 393 (1875).

⁷ *Bhaygo Mully Bibee v. Mahomed Wasil*, 25 W. R., 313, 315 (1876).

order to maintain a suit for possession by one shareholder against another, something amounting to an actual turning of the co-sharer out of possession or a refusal to let him enter must be shown. The acts should constitute a dispossession. But apart from the question of possession, if there be acts wrongful as between co-sharers, the Court will in some cases compel co-sharers to act equitably towards each other, even although they could not maintain a suit to recover possession, and without forcing them to a partition.¹

In a suit to recover joint possession of an occupancy holding in respect of his share by a co-sharer landlord on the ground that the defendant acquired no title by the purchase of the said holding, as it was not transferable by custom, and that there was an abandonment of the holding by the former tenant, the defence (*inter alia*) was that the plaintiff was not entitled to joint possession, and that he could not get any relief except by a suit for partition. Held that the plaintiff was entitled to the relief claimed, and that the claim for joint possession without partition was maintainable.²

An Injunction may be granted in the case of trespass, (a) Injunction where there has been an ouster of the co-sharer, and in the case of waste, where there is an infringement of the legal right constituting, in the case of structures and excavations, a substantial and material injury not remediable upon partition; and in the case of cultivation where there has been an exclusion of the shareholder from enjoyment, such exclusion being in denial of his title.³

The English Courts have considered it to be against the policy of the law to entertain claims or cross-claims

(iv) Principles upon which Injunctions are granted in cases of co-sharers.

¹ *Mohima Chunder Ghose v. Mahabub Chunder Nag*, 24 W. R., 80 (1875).

² *Dilbar Sardar v. Husain Ali Be-piri*, I. L. R., 28 Cal., 35 (1899).

³ *v. post*.

for damages, or for Injunctions between joint-tenants or tenants-in-common, a remedy being open to the parties in the form of partition. The Court will not interpose to restrain waste in the case of co-parceners, joint-tenants and tenants-in-common, unless it amounts to destruction, waste or spoliation, or unless the wrong-doer is insolvent or incapable of paying to the other the excess of the value beyond his own share.¹

The Court will also interfere to restrain waste where the wrong-doer is occupying tenant to the other;² but such a case is no real exception to the general rule for, by the agreement to hold as occupying tenant, there is a contract which establishes a relation similar to that of landlord and tenant to one another.³ If one tenant-in-common thinks proper by agreement with the other to hold the premises as an occupying tenant, the effect of that contract being to exclude the other from entry for any purpose, the tenant has thereby prohibited any act by himself, but such as an occupying tenant may do. If the result of that voluntary obligation on his part is, that he cannot deal with his own moiety as he might, if he had not incurred that obligation, the question is, whether he must not get rid of that relation, so voluntarily contracted, before he can exercise that original power, which he had before he entered into that contract.

One reason in addition to those of general policy upon which the Courts have hesitated to interfere on the ground

¹ Kerr, Inj., 77.

² *Twort v. Twort*, 16 Ves., 129. There is nothing to prevent one co-sharer being the tenant of all the others and paying rent to them as such. But the mere fact that one member of a family holds exclusive occupation of any part of the property, carries with it no undertaking

to pay rent, in the absence of some agreement to that effect, express or implied. *Mayne's Hindu Law*, § 276.

³ But if there be no express contract of tenancy, the occupation of one tenant-in-common does not establish that relation between him and the others. See *Bailey v. Hobson*, L. R., 5 Ch. App., 190.

of waste is that, if it does so interfere, it must proceed to apply the principle throughout; to grant the whole equitable relief; for instance, to prevent felling trees planted for ornament; which would be a strong measure in such a case; yet the Court, if it touches the subject, must go to that extent.¹ So also it has been held in this country that the Court will not generally interfere by Injunction to control a tenant-in-common dealing with joint property which is rightly in his possession, unless those dealings threaten to be of a destructive character.²

If one tenant-in-common is doing merely what any other owner of land might do, the other cannot have an Injunction merely on the ground that he does not choose to do so, since each tenant has a right to enjoy as he pleases. But if the act amounts to destruction, the Court will interfere.³ The destruction of the thing itself is an ouster.⁴ When there are acts of positive and actual destruction an Injunction will be granted, since such acts are not done in the legitimate exercise of the enjoyment arising out of the nature of the party's title to that, which belongs to him and the other party.⁵ It is apprehended that the Courts of this country will also interfere, where the wrong-doer is insolvent or incapable of paying to the other the excess of the value beyond his own share.

As regard trespass, it is a peculiar incident of the estate of tenants-in-common that there cannot be a trespass as between themselves, unless the act amounts to ouster, for each of them is alike entitled to use and

¹ *Twort v. Twort*, 16 Ves., 128, 132.

² *Stalkart v. Gopal Panday*, 20 W. R., 168, 169, 170 (1873); s. c., 12 B. L. R., 197.

³ *Twort v. Twort*, 16 Ves., 128; *Hole v. Thomas*, 7 Ves., 589; *The Durham and Sunderland Railway v.*

Warr, 3 Beav., 119 cited in *Stalkart v. Gopal Panday*, 20 W. R., 168, 169 (1873); *Arthur v. Lamb*, 2 Dr. & Sm., 428.

⁴ *Wilkinson v. Haygarth*, 16 L. J. N. S., Q. B., 103.

⁵ *Twort v. Twort*, supra, 131.

enjoyment (subject, it may be, to a subsequent duty of accounting for profits), and all acts of use and enjoyment in an ordinary course and according to the nature of the subject-matter are presumed, in obedience to a well-known principle, to be done in exercise of that lawful right.¹

And though the Courts will not generally interfere between co-tenants on account of dealings with the common property not involving destructive waste, it will in cases of ouster compel a tenant to allow his co-tenant a proper share in the enjoyment of the joint property when the former has excluded the latter therefrom.² But in the case of exclusion caused by proper cultivation, to entitle the plaintiff to an Injunction by reason of trespass and ouster, that ouster must have been in denial of the plaintiff's title.³

In England, inasmuch as co-tenancy is an uncommon form of estate, and the Courts have not shown any special facility in granting Injunctions between co-tenants, such Injunctions are of very rare occurrence. In this country, as might be expected, questions of this nature arise much more frequently between co-owners than in England, and the decided cases are numerous. There are many cases in which an Injunction has been granted, and in some⁴ very general language has been used as to the right of a part-owner to restrain his co-owner.⁵ So the proposition that one co-sharer has an absolute right as a general rule of law to say to his co-sharer, "you shall not cultivate that land in any way without my consent,"

¹ Pollock and Wright on Possession, p. 87. Pollock on Tort, 327.

² *Stalkart v. Gopal Panday*, 20 W. R., 168 (1873).

³ *Watson & Co. v. Ram Chand Dutt*, I. L. R., 18 Cal., 10 (1890).

⁴ See cases cited in *The Shan-nugger Jute Factory v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 200. per Wilson, J. (1886).

⁵ *Ib.*

and to enforce that right, at least in the absence of any special circumstances, by claiming an Injunction in a Court of law, has, for its support, the language of some learned judges in delivering judgment upon cases before them.¹ But it may well be open to consideration, whether the expressions used in some of these cases, if taken as unqualified propositions of law and without regard to the context, are wholly correct. On the other hand, a rule in conformity with the English decisions has been acted upon in a number of cases,² and it has been contended upon the authority of English decisions, that an Injunction between co-sharers is a thing which either ought never to be granted, or at any rate only under very unusual circumstances.

“But, though, of course, the principles on which English Courts administer the remedy by Injunction must be taken to be those which the Legislature meant to affirm in the Specific Relief Act, still the circumstances of this country are very different from those of England; and it would be a dangerous thing to assume that, because the Courts in England have very rarely found it necessary to grant an Injunction as between co-sharers, in order to prevent multiplicity of suits or upon any other grounds, Courts in this country may not properly be somewhat less rigid in doing so. The circumstances of the country are different; the positions of co-sharers and persons with partial interests in land are very different from those in England; and the interests of part-owners may here require protection by Injunction in classes of cases in which it is not necessary to grant it in England. There

Injunctions in India

¹ *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 219, per Wilson, J. (1887).

² See cases cited, per Wilson, J.,

in *The Shomnugger Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 201 (1886).

is a large number of cases which go to show that the remedy by Injunction may in this country be given in cases between co-sharers, when the circumstances of the cases are such as to render it necessary, in order to secure those objects which, according to the law, should be secured by Injunction. Particularly, since the passing of the Specific Relief Act, an Injunction may properly be granted, if on a consideration of the facts of the case, the Court thinks that that remedy is necessary in order to prevent repetition of injury and multiplicity of suits.''¹

The Court has therefore refused to accede to either of these extreme propositions.² And with regard to the conflict of cases and in particular to those cases which appear to lend support to either of the extreme propositions mentioned, it must be remembered that the observations therein should be read and understood with reference to the particular facts of the case dealt with and the particular remedy sought in that case.³ It has been said that until the decision of the Privy Council in the case of *Watson & Co. v. Ramchand Dutt*,⁴ there seemed to be but little authority in decided cases to show how far courts of justice will interfere to control the use of property as between joint owners, or how far they will leave those who are dissatisfied with its use to seek a remedy by partition.⁵ By that case and the decision in *Lachmeswar Singh v. Manowar Hossein*,⁶ the Privy Council have practically settled the rights of owners of lands which

¹ *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 214, 219, 220 (1887), per Wilson, J.

² *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 219 (1887).

³ *Nocurry Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 700 (1882), where a

classification is given of the case-law.

⁴ I. L. R., 18 Cal., 10 (1890); S. C., I. L. R., 17 I. A., 110.

⁵ *Lachmeswar Singh v. Manowar Hossein*, I. L. R., 19 Cal., 264 (1891), per Lord Hobhouse.

⁶ I. L. R., 19 Cal., 253; S. C., I. L. R., 19 I. A., 48 (1891).

are held jointly.¹ The latter of the Privy Council cases stated the summary of the decision in the former suit as follows, namely, that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases.² The Privy Council have also intimated that the rule as to rights of persons holding land in common in Bengal was hardly to be found in the analogy of English cases, but might be derived from the direction in section 9 of Bengal Regulation VII of 1832, namely, that where there should be no specific rule, the case must be decided according to justice, equity and good conscience.³ In disputes between members of a joint Hindu family with respect to joint property, the exercise of the Court's jurisdiction to grant relief by Injunction should be confined to acts of waste, illegitimate use of the family property, or acts amounting to ouster.⁴

Some particular instances of use of joint property in which the interference of the Court has been sought are given in the following pages. The cases therein cited must, however, be read in the light of the principles hereinbefore stated.

Cultivation may, or may not, according to the circumstances, constitute an act entitling a co-sharer to relief by damages or Injunction. In an early case⁵ it was held that mere infringement of right by reason of cultivation will not support an Injunction, and that the remedy for such infringement lay in damages.⁶ In subsequent cases

¹ *Rohini Singh v. J. Hodding*, I. L. R., 21 Cal., 340, 343, 344 (1893), per O'Kinealy and Ameer Ali, JJ.

² I. L. R., 19 Cal., at p. 265.

³ *Watson & Co. v. Ram Chand Dutt*, I. L. R., 18 Cal., 17 (1890).

⁴ *Anant Ramrav v. Gopal Balvant*, I. L. R., 19 Bom., 269 (1897); see also as to the rights of co-parceners *inter*

see Mayne's Hindu Law, § 275. *Ganpat v. Annaji*, I. L. R., 23 Bom., 144 (1898).

⁵ *Crowdy v. Inder Roy*, 18 W. R., 408 (1872).

⁶ Ouster is a question of fact and mere cultivation is not ouster. *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 217, 218 (1887).

*Watson & Co.
v. Ram Chand
Dutt.*

which will be shortly noticed the question was variously dealt with and was in large part finally settled by the leading case decided by the Privy Council of *Watson & Co. v. Ram Chand Dutt.*¹ In that case the Watsons who were originally in possession of the whole *mouzah* but at the date of suit had two annas only, had built factories, reclaimed waste land, and cultivated indigo thereon. The District Judge at the instance of their co-sharers granted an Injunction against them prohibiting the growing of indigo. The High Court upon the ground of ouster upheld the Injunction, but modified it, so that it became an Injunction against growing indigo in such a manner as to exclude the co-sharers. The Privy Council held that there was no ouster involving denial of title, the exclusion of the co-sharers not being in denial of their title, but simply with a view to self-protection, and refused an Injunction but gave compensation only. It laid down the following rules :—(1) That the Courts should be cautious of interference with the rights of co-sharers ; (2) that the circumstances of this country and its law were to be considered ; (3) that where a co-sharer is in actual occupation of land not actually used by another, cultivating in a proper course of cultivation, and that sharer resists a co-sharer not in denial of title, but with a view to self-protection, there should be no decree for joint possession or Injunction, but damages only should be given.

In other cases an Injunction has been granted against a particular form of cultivation. So in the case cited below²

¹ I. L. R., 18 Cal., 10 (1890), s. c. in High Court, I. L. R., 15 Cal., 214 (1887).

² *Crowdy v. Bhikdaree Singh*, 16 W. R., 41 (1871). This decision merely lays down that one co-sharer

cannot interfere with the ownership of another without his consent, whether (1) he interferes by taking *khas* exclusive possession of the land which belongs to both jointly, or (2) interferes by disturbing the occupation

the plaintiff^{*} sued to restrain defendant from growing indigo on (1) *khodkhast* land, and (2) on lands which were the *ijmali ryoti* lands of all the joint proprietors of the village in which plaintiff and the defendant were co-sharers. In respect of (1) *khodkhast* land the defendant clearly had no right. In respect of (2) namely the other land, such land was *ryoti* which the defendant had attempted to cultivate by force. The Court held that, if no immediate injury were likely to arise from the cultivation of the *ijmali* lands with indigo, it would probably be advisable to leave the plaintiff to his remedy by an action for damages, but that there was an immediate injury as the produce of the lands was hypothecated for the rent: that if a crop of indigo was substituted for the ordinary crop, it would become valueless to all but the particular persons who have the means of converting the plant into the manufactured article, and an Injunction was granted against the cultivation of indigo without the consent of all the proprietors or of the ryots who held tenures on the *ijmali* lands. The facts of this case appear not to be within the principle in the leading decision. The wrong-doer was not in actual occupation of land not used by another. The ryots were in occupation. There was an attempt to cultivate by force. There was other injury than that which is involved in the alteration of the condition of property by mere change of cultivation. The rights both of the ryots and co-proprietors were infringed, and the value of the land as a security was diminished.

In a subsequent case¹ it was held that, if a co-sharer has wrongfully taken exclusive possession of portion of

of joint ryots against the will of those (1873).
 ryots. *Per* Phear, J., *Fureedoonissa* ¹ *Macdonald v. Lalla Nish Dyal*,
v. Ram Onogra Singh, 21 W. R., 18 21 W. R., 17 (1874).

the joint property and has been cultivating indigo thereon without the consent of the co-sharers, the plaintiff would have the right to ask that he be turned out of exclusive possession, and also that he be prohibited for the future from doing anything on the land which is the subject of suit, which a co-sharer of the plaintiff has no right to do.

This particular case was remanded to the lower Court for trial upon the issue of the alleged wrongful exclusive possession. The allegation was that the defendant had cultivated the land after wrongfully turning the ryots out of it. The Court held that, if that allegation could be made out in fact, the plaintiff would be entitled to an order ejecting the defendant from exclusive possession and an Injunction restraining him for the future from doing any act which was inconsistent with the joint proprietorship. The facts in this case also appear to be distinguishable from those in the leading decision, there being a forcible ouster both of the co-sharers and the ryots.

To support a claim for an Injunction the plaintiff must show that he himself wished to cultivate the land jointly with his co-sharer, that he has not been consulted as to its cultivation, and that he objects to its being cultivated in a particular manner on his behalf jointly with others. It is not sufficient to say that as joint proprietor he does not wish that indigo should be grown, not on his behalf but by or for any one in the *mouzah*.¹ A defendant has no right to complain of delay, where it

¹ *Nundun Lall v. Lloyd*, 22 W. R., 74 (1874); see *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80 (1875). In *Ram Chand Dutt v. Watson & Co.*, I. L. R., 15 Cal., 220 (1887), the Court doubted whether

cultivation of indigo could be absolutely restrained, but granted an Injunction restraining its cultivation in such a manner as to exclude the co-sharer.

has operated rather as an advantage to himself.¹ In other cases an Injunction against cultivation has been granted under circumstances somewhat similar to those in the leading decision.²

As in the case with regard to the right of cultivation ^{(b) Building.} the decisions respecting the erection of buildings are of a varying character. In some, general language is used which it is not easy to reconcile with the limitations contained in others, even after making allowance for the peculiar facts and circumstances of each case.

Every co-proprietor has a right of veto to forbid anything being done to the common property without his consent.³ With a view to enforce this right a person can sue to restrain his co-sharers from building on the common property.⁴ One of several co-sharers of joint undivided property has no right to erect a building on land which forms a portion of such property so as to materially alter the condition thereof without the consent of his co-sharers.⁵ A co-sharer who has purchased the rights of ryots having a right of occupancy for agricultural purposes may not do that which they themselves could not have done, namely, convert the land into a

¹ *Lloyd v. Bibee Sogra*, 25 W. R., 313 (1876).

² *Stalkart v. Gopal Panday*, 20 W. R., 168 (1873); s. c., 12 B. L. R., 197; *Lloyd v. Bibee Sogra*, 25 W. R., 313 (1876), where a decree for joint possession, damages and injunction were given upon the ground that it would be ineffectual to leave the plaintiff to an action for damages from time to time.

³ *Janktee Singh v. Bukhoorie Singh*, S. D. A. (1856), 761. [The proposition is too widely stated in the matter of the petition of *Thakoor Chunder Paramanick*, B. L. R., Sup. Vol.,

597 n. 6 (1866), the Court said, "We are not prepared to accept this rule as law."'] [Each sharer is entitled to every portion of the land; *Duarkanath Bhooyea v. Gopeenath Bhooyea*, 12 B. L. R., 190 n. (1871)].

⁴ *Ib.*; followed in *Baboo Indurdeonarain Singh v. Toolseonarain Singh*, S. D. A. (1857), 765.

⁵ *Sheopershad Singh v. Leela Singh*, 12 B. L. R., 188, 191, 192 n. (1873); *Massim Mollah v. Panjoo Ghoramee*, 21 W. R., 373 (1874); *Guru Dass Dhar v. Bijaya Gobinda Baral*, 1 B. L. R., 106, A. C. (1868); and cases cited in last two notes.

dwelling-house and its appurtenances.¹ Many, and perhaps the majority, of the decisions on this point, in accordance with the terms of the Specific Relief Act, have limited the issue of an Injunction to cases where the building causes a material and substantial injury not remediable by compensation or partition.² In the first place, the Court will ascertain whether the plaintiff has any strict right to prohibit the defendant from the particular act complained of. Then, if such right be made out, the question arises whether he is in a position to enforce that right and to ask the Court's assistance, and then in what form, if any, relief shall be given.³ Relief, in the form of an Injunction, is in the discretion of the Court. The Court is not bound to grant an Injunction even if the defendant have exceeded his strict rights.⁴ The Court will enquire into all the circumstances of the case, and will see what is fair and reasonable as between co-sharers; and, if what has been done is neither unfair nor unreasonable, then, whether it be in accordance with the strict rights of the parties or not, the Court has a discretion to leave the plaintiff to his strict remedy by partition or any other remedy he can maintain.⁵ The act complained of must be injurious, and the term "injury" means something substantial, something that materially affects the position of the parties,⁶ and which, in the case of an injury committed, cannot be remedied upon partition.⁷ The Court may interfere in a

¹ *Jugut Chunder Roy Chowdhry v. Eshan Chunder Banerjee*, 24 W. R., 220 (1875).

² *v. post.*

³ *Jugut Chunder Roy Chowdhry v. Eshan Chunder Banerjee*, 24 W. R., 220, 222 (1875).

⁴ *Massim Mollah v. Panjoo Ghoramee*, 21 W. R., 373 (1874); *Jugut*

Chunder Roy Chowdhry v. Eshan Chunder Banerjee, 24 W. R., 220 (1875).

⁵ *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80 (1875).

⁶ *Joy Chunder Rukhit v. Bippro Churn Rukhit*, I. L. R., 14 Cal., 236, 238 (1886).

⁷ *Paras Ram v. Sherjit*, I. L. R., 9 All., 665 (1887).

proper case, as where the injury is of a permanent or recurrent character,¹ or where there is denial of title or exclusion, since such exclusion amounts to a forcible partition.² But there is no such broad proposition as that one co-owner is entitled to an Injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the Injunction.³ And the fact that the plaintiff has given notice of objection to what is threatened before it has been carried out, does not make the grant of the Injunction a matter of course.⁴ A plaintiff is not entitled to judgment upon a ground which is inconsistent with the case set out in the plaint.⁵ Where an Injunction has been granted, and there is an appeal against such order, it is for the appellant to show that the lower Court has exercised a wrong discretion, otherwise the appellate Court will not interfere.⁶

The building may, or may not, have been erected at the date of suit.

In the first case, a mandatory Injunction is usually sought directing the demolition of the building. There is a considerable difference between a case in which the other co-sharers acting with diligent watchfulness of

¹ *Rajendra Lall Goswami v. Shama Churn Lahori*, I. L. R., 5 Cal., 194 (1879).

² *Guru Das Dhar v. Bijaya Gobinda Baral*, 1 B. L. R., 108 (1868); *Shadi v. Anup Singh*, I. L. R., 12 All., 436, 438 (1889); *Rajendra Lall Goswami v. Shama Churn Lahori*, I. L. R., 5 Cal., 188, 190 (1879). See also *Masim Mollah v. Panjoo Ghoramee*, 21 W. R., 373 (1874). Where a sharer is not entitled to exclusive possession an order of the Magistrate will not sanction it. *Rajendra Lall Goswami*

v. Shama Churn Lahori, I. L. R., 5 Cal., 188 (1879).

³ *The Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 200 (1886) [followed in *Joy Chunder Rukhit v. Bippro Churn Rukhit*, I. L. R., 14 Cal., 236, 239 (1886)].

⁴ *Ib.*

⁵ *Nabin Chandra Mitter v. Mahes Chandra Mitter*, 3 B. L. R., App., 111 (1869).

⁶ *Shadi v. Anup Singh*, I. L. R., 12 All., 436, 438 (1889).

their rights seek by an Injunction to prevent the erection of a permanent building, and a case in which, after a permanent building has been erected at considerable expense, a co-sharer seeks to have that building removed.¹ Even if the defendant have not a strict legal right to build upon the joint land, the case may not be one in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict right, but a Court of Equity is not bound to give its assistance for the enforcement of such rights.² In a case in which, after a permanent building has been erected at considerable expense, a co-sharer seeks to have that building removed, the principle which seems to have been settled by the decisions of the Calcutta Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show (1) that injury³ has accrued to him by reason of the erection of the building;⁴ and (2) that there has been no acquiescence⁵

¹ *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 708, 709 (1882); *Paras Ram v. Sherjit*, I. L. R., 9 All., 664 (1887).

² *Lala Biswambhar Lal v. Rajaram*, 3 B. L. R., Ap., 67 (1869); *Massim Mollah v. Panjoo Ghoramee*, 21 W. R., 373 (1874); *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80 (1875).

³ *Lala Biswambhar Lal v. Rajaram*, 3 B. L. R., Ap., 67; *Sri Chand v. Nim Chand Sahu*, 5 B. L. R., Ap., 25; *Mohima Chunder Ghose v. Madhub Chunder Nag*, 24 W. R., 80; *Joy Chunder Rukhit v. Bippro Churn Rukhit*, I. L. R., 14 Cal., 238 (1886); *Rajendra Lal Goewami v. Shama*

Churn Lahiri, I. L. R., 5 Cal., 192 (1879); *Shadi v. Anup Singh*, I. L. R., 12 All., 437, 438; *Paras Ram v. Sherjit*, I. L. R., 9 All., 664 (1887); *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 708 (1882).

⁴ *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 709 (1882); *Paras Ram v. Sherjit*, I. L. R., 9 All., 664 (1887).

⁵ *Jankee Singh v. Bukhoria Singh*, S. D. A. (1856), 761; *Baboo Indurdeenarain Singh v. Toolseennarain Singh*, S. D. A. (1857), 765; *Massim Mollah v. Panjoo Ghoramee*, 21 W. R., 373, 374 (1874); *Shadi v. Anup Singh*, I. L. R., 12 All., 437 (1889).

or delay' on his part and perhaps further' that he took reasonable steps in time to prevent the erection. Even if the defendant be in strictness not within his rights, and the house has been erected, the assertion of the plaintiff's strict right might be attended with loss to the defendant, which would be out of proportion to the relief which the plaintiff asks for. The Court ought to enquire whether under all the circumstances the ends of justice cannot be satisfied by some remedy other than a mandatory Injunction.³ The Court will the more readily interfere, if the buildings be of a *kachcha* character and of no value.⁴

The rule laid down by the decisions of the Calcutta High Court has been stated by the Allahabad High Court to be that when a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners, unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land.⁵ And the mere circumstance of a building being erected by a joint owner of land without the permission of his co-owners and even in spite of their protest, is not sufficient in itself to entitle such co-owners to an Injunction, unless they can show that the building has caused such material and substantial injury as a Court of Equity could not remedy in a suit for partition of the joint land.⁶ The Allahabad

¹ *Shadi v. Anup Singh*, I. L. R., 12 All., 439 (1889).

² *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 709, 710 (1882); *Paras Ram v. Sherjit*, I. L. R., 9 All., 664, 665 (1887).

³ *Massim Mollah v. Panjoo Ghosramee*, 21 W. R., 373 (1874); *Jugut*

Chunder Roy Chowdhry v. Eshan Chunder Banerjee, 24 W. R., 220 (1875).

⁴ *Shadi v. Anup Singh*, I. L. R., 12 All., 436, 439 (1889).

⁵ *Paras Ram v. Sherjit*, I. L. R., 9 All., 665, 663—666 (1887).

⁶ *Ib.*, 665, 666; *Joy Chunder Rukhi v. Bippro Churn Rukhi*, I. L. R., 14 Cal., 236 (1886).

High Court, however, have recently held that one of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, and an Injunction may be granted, notwithstanding that the erection of such building may cause no direct loss to the other joint owners.¹

One of two tenants in common of a party wall may have an Injunction to restrain alterations in the wall.² If a sharer without the consent and against the will of his co-sharer threatens or commences to erect a building upon the common property, in such a case, inasmuch as one co-sharer has no right without the consent of the others to alter the condition of the joint property, he may be restrained by Injunction. The suit must, however, be brought by a party when either the infringement of his right is first threatened or commenced. If he stands by and suffers the building to proceed to a considerable extent his consent to the erection will be implied therefrom, and he must fall back on his remedy, if any, in the form of an action for damages, if any, done to the common property.³ If a plaintiff raises no objection when the building is commenced, but stands by and allows the defendant to expend a considerable sum of money on the building before instituting his suit, an Injunction will be refused.⁴ The cases above cited⁵ must be distinguished from those

¹ *Najju Khan v. Imtiaz-uddin*, I L. R., 18 All., 115 (1895).

² *Kanakayya v. Narasimhula*, I. L. R., 19 Mad., 38 (1895); the head note is liable to mislead. There was injury as for instance the exclusion of the plaintiff from the use of the top of the wall.

³ *Jankee Singh v. Bhukhooree Singh*, S. D. A. (1856), 761; *Baboo Indur-*

deonarain Singh v. Toolsee Narain Singh, S. D. A. (1857), 765; I B. L. R., A. C., 108 (1868); I L. R., 12 All., 436 (1889).

⁴ *Nocury Lall Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 708 (1882); *Holloway v. Sheikh Wahed Ali*, 12 B. L. R., 192n. (1871).

⁵ In the following cases Injunctions were granted:—*Jankee Singh*

in which a stranger has with knowledge of the plaintiff's exclusive title trespassed upon land by building thereon, and those to which the equitable doctrine of estoppel by acquiescence would be applicable. The rules of equity applicable to trespasses by strangers are different from those applicable in the case of co-sharers.¹

Similar considerations apply in the case of excavations^{(c) Excavations.} by co-sharers as apply in the case of buildings. It must be shown that the excavation has caused a substantial injury materially affecting the position of the co-sharer,² and not remediable on partition³ before a mandatory Injunction will be issued directing the defendant to fill up a tank, excavated by him on the joint land, and to restore that land to its former state.⁴ The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order restoring the land to its former condition.⁵ Where, in the case of a tank, the plaintiff did not allege

v. *Bukhooree Singh*, S. D. A., (1856) 761; *Baboo Indurdeonarain Singh v. Toolsee Narain Singh*, S. D. A. (1857) 765; *Guru Das Dhur v. Bijaya Gobinda Baral*, 1 B. L. R., A. C., 108 (1868); s. c., 10 W. R., 171; *Holloway v. Wahed Ali*, 12 B. L. R., 191 note (1871); *Rajendra Lal Goswami v. Shama Churn Lahiri*, I. L. R., 5 Cal., 188 (1879); *Shadi v. Anup Singh*, I. L. R., 12 All., 436 (1889); and in the following refused:—3 B. L. R., App., 67 (1869); *Sri Chand v. Wim Chand Sahu*, 5 B. L. R., App., 25 (1870); *Holloway v. Wahed Ali*, 12 B. L. R., 188 (1873); *Holloway v. Wahed Ali*, ib., 189 note (1871); *Masim Mollah v. Panjoo Ghoramee*, 21 W. R., 373 (1874) [it must be shown no other remedy will be sufficient];

Jugut Chunder Roy Chowdhry v. Eshan Chunder Banerjee, 24 W. R., 80 (1875); *Nocury Lal Chuckerbutty v. Bindabun Chunder Chuckerbutty*, I. L. R., 8 Cal., 708 (1882); *Shamnugger Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal., 189 (1886); *Paras Ram v. Sherjit*, I. L. R., 9 All., 661 (1887).

¹ *Paras Ram v. Sherjit*, I. L. R., 9 All., 663, 664 (1887).

² *Joy Chunder Rukhit v. Bippro Churn Rukhit*, I. L. R., 14 Cal., 236 (1886); 24 W. R., 80 (1875).

³ *Paras Ram v. Sherjit*, I. L. R., 9 All., 661 (1887).

⁴ *Joy Chander Rukhit v. Bippro Chander Rukhit*, I. L. R., 14 Cal., 236 (1886).

⁵ *Ib.*

that he had been excluded from the part of the land in which it had been excavated or that he desired to appropriate it to any other purpose, and that he had been prevented from doing so, and the land taken formed but a very small portion of the joint property, it was held that the plaintiff had not suffered any injury by what had been done, and his suit was dismissed.¹

(d) Other
injurious acts.

The ordinary cases of alleged injury are those caused by cultivation of, building upon, or excavation of the joint property. There may, however, be other acts entitling a sharer to relief against his co-sharers such as waste by felling timber, destruction of the family dwelling-house or other family or joint property.² Whether, however, that relief will be by way of an Injunction will depend upon the further question whether the circumstances of the particular case admit of such a remedy upon the principles laid down in the Specific Relief Act and the decision cited in the preceding pages.

It has, however, already been pointed out that mere user of land to the profit of a co-sharer without damage to others, such user involving neither an alteration in the condition of the land nor an exclusive possession, constitutes no infringement of the co-owner's rights. Therefore, where a ferry was established by a co-owner, and the other sharers were in no way excluded or otherwise damaged, they were held to have no cause of action in respect thereof.³

The foregoing rules may be thus summarized :—(1) The Courts will, in all cases, be cautious of interference with the possession and enjoyment of joint property.

¹ *Mokima Chander Ghose v. Madhub Chunder Nag*, 24 W. R., 80, 81 (1875).

² See Act I of 1877, s. 54, Ill. (n).

³ *Lachmendar Singh v. Manowar*

Hossein, I. L. R., 19 Cal., 253 (1891); v. *ante*, where the facts of this case are given.

(2) If one co-sharer uses the joint property to the greater profit of himself, but without damage to the co-sharers, there is no cause of action. (3) Inasmuch as each co-sharer is entitled to a portion of every part of the joint property, the Courts will not as a general rule enforce merely strict rights and will not interpose where the user is slightly in excess of the right. (4) Where there is an infringement of a character which is sufficiently substantial to entitle to some relief, the Courts will, in the determination of the question whether an Injunction should be granted, consider whether the injury is adequately remediable by damages and partition. If that be the case, an Injunction will be refused. (5) In the particular case of alleged injury through cultivation in the ordinary course by a co-sharer in actual occupation and sole use of the property, damages and not an Injunction will ordinarily be granted even though the cultivation has the effect of excluding a co-sharer, unless such exclusion is in denial of that co-sharer's title, in which case an Injunction will be granted; such a rule being necessitated by the climate, soil and other peculiar circumstances of this country in which lands are ordinarily cultivated in common. (6) In all other cases an Injunction may be granted where the act complained of involves the exclusion of the co-sharer, or some other material and substantial injury not remediable by partition or damages, such as the material and injurious alteration of the nature and condition of the property to which the parties are jointly entitled.

§ 78. It was an old and well-established doctrine pertaining to the jurisdiction of equity by Injunction against waste, that it was not exercised as against a stranger to the premises, without interest or title therein, or when no privity existed between the parties to the action,

Persons for whom injunctions against waste will be granted.

defendants being regarded in such cases as trespassers, and as such liable to an action of trespass at law. A mere stranger might be immediately dispossessed, and, if the facts did not show privity of title or irremediable injury, the Injunction, if already granted, was dissolved.¹ Under the modern jurisdiction, it is still necessary in actions for perpetual Injunctions against waste, and in which such Injunction is the material or a substantive portion of the relief sought, to allege and prove privity of title between the parties to the suit. For the essential character of the tort of waste is, that the party committing it is in rightful possession, and that there is privity of title between the parties. If there be no such privity, there is no waste technically so called. In *any* suit, however, if it be proved that any property in dispute in the suit is in danger of being wasted, the Court may grant a temporary Injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting of the property as the Court thinks fit. It is possible, therefore, that such a temporary Injunction might be issued against a stranger to the title. But in such case the waste, though waste in fact, would not be waste in its technical sense, and the Injunction would be granted as ancillary merely to the other relief sought in the suit. The act of waste is restrained not upon the ground that the privity of the plaintiff's title demands such restraint, but for the purpose of preserving the *status quo ante* until decree.

In the case of waste property so called, as a general rule he only who has the remainder or reversion of the inheritance is entitled to relief. Trustees may also sue

¹ High, Inj., § 656; *Mogg v. Mogg*,
Dick, 670; *Wrixon v. Condron*, 1
Ir. Eq., 380; *Congleton v. Mitchell*,

12 Ir. Eq., 45; *Mortimer v. Cottrell*,
2 Cox., 205, there cited.
² Civ. Pr. Code, s. 492.

to restrain and stay waste. So, if the legal estate is in trustees upon trust for a tenant for life, with remainders over, and the tenant for life commits waste, the trustees have a right to sue to restrain the waste, and it is their duty to do so, if parties unborn are interested.¹ As to coparceners, joint tenants, and tenants in common, mortgagors and mortgagees, landlords, persons entitled upon the death of Hindu female heirs and others, see the pages undermentioned.

§ 79. It was a well-established principle of equity Account. jurisprudence that in all cases where a bill for an Injunction would lie to restrain waste, an account of, and satisfaction for, the waste already committed was allowed to prevent multiplicity of suits as well as to afford complete redress, without compelling a resort to law. An account of the waste committed and a decree for damages might have been had in the Injunction suit. Such an account might have been decreed as between tenants in common. On the other hand, the general maxim was "no Injunction no account."² To this rule which had as its ground the divided jurisdictions of the Courts, there were several exceptions,³ which it is now unnecessary to state. For in this country a suit may be brought praying for several reliefs in combination or in the alternative. A party may sue both for an Injunction and an account, and may be awarded both remedies, or he may be refused an Injunction and given a decree for damages and an account.

¹ Kerr, *Inj.*, 75, 76; *High, Inj.*, §§ 696—696; so also trustees to preserve contingent remainders may sue; *ib.*

² *Parrot v. Palmer*, 3 My. & K., 632, *per* Lord Brougham.

³ See *High, Inj.*, §§ 669, 670; Kerr, *Inj.*, pp. 104—107.

CHAPTER X.

INJUNCTIONS AGAINST NUISANCES.

<p>§ 80. NUISANCES GENERALLY.</p> <p>§ 81. INJUNCTIONS AGAINST NUISANCES.</p> <p>§ 82. NUISANCES IN RESPECT OF NATURAL RIGHTS.</p> <p style="padding-left: 20px;">(i) Air.</p> <p style="padding-left: 20px;">(ii) Light.</p> <p style="padding-left: 20px;">(iii) Water.</p> <p style="padding-left: 20px;">(iv) Support.</p> <p>§ 83. NUISANCES IN RESPECT OF EASEMENTS.</p> <p style="padding-left: 20px;">(i) Air.</p> <p style="padding-left: 20px;">(ii) Injunctions against obstruction of air.</p> <p style="padding-left: 20px;">(iii) Light.</p>	<p style="padding-left: 20px;">(iv) Injunctions against obstruction of light.</p> <p style="padding-left: 20px;">(v) Support; and Injunctions against withdrawal of:</p> <p style="padding-left: 20px;">(vi) Water and Injunctions in respect of rights to water.</p> <p style="padding-left: 20px;">(vii) Way and Injunctions in respect of right of way.</p> <p style="padding-left: 20px;">(viii) Privacy and Injunctions to preserve.</p> <p>§ 84. MANDATORY INJUNCTIONS.</p>
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Nuisance
generally.

§ 80. A nuisance is a misuse or abuse of a man's own property or proprietary rights, or an unauthorized use of public property causing either danger to the public (in which case it is called a public nuisance) or merely damage to a private citizen (in which case it is called a private nuisance), and not necessarily depending for its wrongful character on malice or negligence and not amounting to trespass.¹ Trespass is the wrongful disturbance of another in his exclusive possession of property. Where the infringement of the right is the consequence of an act which is not in itself an invasion of property, the cause from which the injury flows is termed a nuisance

¹ Underhill on Torts, p. 219, *et seq.*, 6th Ed. As to public nuisances see *Sollau v. De Held*, 2 Sim. N. S. 142; *Keri, Inj.*, 167—170.

In the one case it is the immediate act which causes the injury, in the other the injury is the consequence of an act done beyond the bounds of the property affected by it.¹ The law with regard to nuisances mainly depends upon the maxim *sic utere tuo ut alienum non laedas* which prohibits acts which are an abuse of the legal rights enjoyed by a proprietor. The maxim cited applies only to cases where the act complained of violates some right, and an act legal in itself violating no right cannot be restrained by Injunction upon the ground of the wrong motive which induced it.² Torts arising out of nuisances may be either those in which the *damnum* consists of some bodily injury, such as that resulting from the keeping of unfenced excavations near a highway, permitting premises adjoining a highway or land of another to fall into a ruinous condition, the creation of noxious fumes and the carrying on of noisome or noxious employment. The two latter forms of nuisance may also be conveniently dealt with under the next head, namely, torts in which the *damnum* consists of some injury to property or interference with the ordinary physical comfort of human existence in such property. So one who brings or collects water upon his land does so at his peril, for, if it escape and injure his neighbour, he is liable, however careful he may have been.³ And on the same principle a man who has called into special existence an electric current for his own purposes and who discharges it into the earth beyond his control, is as responsible for damage which that current does to his neighbour as he would have been, if, instead, he had discharged a stream of water.⁴

¹ Kerr, *Inj.*, 166, 167.

H. L., 330.

² Beach, *Inj.*, § 1076.

⁴ *National Telephone Co. v. Baker*,

³ *Fletcher v. Rylands*, L. R., 3 1893, L. R., 2 Ch., 186.

Under the last-mentioned class of torts are those which consist in injuries to servitudes, whether natural or conventional. Natural servitudes or natural rights are such as are necessary and natural adjuncts to the properties to which they are attached (such as the rights to air, light, support and water), and they apply universally. Conventional or acquired servitudes are not universal, but must always arise by custom, prescription, or express or implied grant. The right to the enjoyment of a conventional servitude is called an easement or a *profit à prendre* according as the right is merely a right of user or a right of acquisition. Of easements those in particular may be mentioned which relate to air, light, support, water and way. In a general sense every violation of an easement may be considered as a nuisance, although the converse of the proposition does not hold true.¹

The commission of a nuisance gives rise to an action for damages, and in appropriate cases a nuisance threatened or committed will entitle the party suing to an Injunction. "What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of Injunction."² The circumstance that the thing complained of may be a public nuisance does not prevent an individual who has sustained special damage over and above that suffered by the rest of the public from bringing an action which is the proper remedy in respect of injuries done to his own personal comfort and enjoyment. The action is usually brought by the occupier or lessee in possession, but the owner may sue on the ground of injury to his property either alone or conjointly with the occupier. To sustain a suit by a reversioner it is

¹ Underhill, *loc. cit.*; High, *Inj.*, 697, *per* Lord Halsbury, L. C.;
 § 848. *Reinhardt v. Mentast*, 42 Ch. D.,

² *Fleming v. Hislop*, 11 App. Cas., 688.

necessary that the wrong complained of should operate injuriously to the reversion either by being of a permanent character or by operating as a denial of right.¹ The acts of several persons may together constitute a nuisance which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.² The Injunction of public nuisances is not favoured, and except for special and urgent reason, equity will not enjoin the erection of a public nuisance where its maintenance is a misdemeanour, subject to indictment.³ The appropriate remedy for a public nuisance is by way of proceeding under criminal law, as for a private nuisance it is by way of action or Injunction.⁴ There is a disposition of Courts of Equity to abdicate in favour of Courts vested with criminal jurisdiction the regulation as well as the punishment of acts which constitute distinctive public nuisances. And yet everywhere these Courts are still vested with jurisdiction to give relief to private parties in all proper cases against nuisances even of a public character.⁵

§ 81. A very frequent ground of Injunction is nuisance. What makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of Injunction.⁶ An Injunction cannot, however, be granted to prevent, on the ground of nuisance, an act of which

Injunctions
against
nuisances.

¹ Kerr, *Inj.*, 168—172; *Land Mortgage Bank v. Ahmedbhai Ha-*
bibhai, I. L. R., 8 Bom., 62, 64,
86, 90 (1883); *High, Inj.*, § 762;
Spelling, op cit., § 383.

² *Thorpe v. Brumfit*, 8 Ch., 650.
Blair v. Deakin, W. N. (1887), 148;
Lambton v. Mellish (1894), 3 Ch.
163.

³ *Beach, Inj.*, § 1078.

⁴ *Mayne's Criminal Law*, 551.
See *Indian Penal Code*, Ch. XIV.

⁵ *Spelling, op. cit.*, § 393.

⁶ *Per Lord Halsbury in Fleming*
v. Hislop, 11 App. Cas., 697; *Rein-*
hardt v. Mantast, 42 Ch. D., 688.
Annoyance is, strictly speaking, a
wider term than nuisance; *Wood*
v. Cooper, L. R., 1894, 3 Ch., 67;
Tod Heatley v. Benham, L. R., 40 Ch.
D., 93. See generally as to Injunc-
tions against nuisances, *Kerr, Inj.*, Ch.
VI; *Beach, Inj.*, Ch. XXXVIII;
Joyce, Inj., 99; *High, Inj.*, Ch.

it is not reasonably clear that it will be a nuisance.¹ When the injury complained of is not, *per se*, a nuisance, but may or may not become so, according to circumstances, and where it is uncertain, indefinite or contingent, or productive of only possible injury, the Court will not interfere.² Subject to this the principles governing the issue of Injunctions in cases of nuisance are the same as those applicable to other torts. The object of the jurisdiction is the restraint of irreparable mischief and protection of property from irreparable or, at least, from substantial or material damage pending the action.³ The defendant will not be enjoined where the alleged nuisance is fairly attributable to natural causes.⁴ The Court will not regard at all trifling nuisances. If damages are a full and adequate compensation for the injury, there is no case for an Injunction, the right to which may be further barred by the conduct of the applicant, his acquiescence or delay.⁵ And it may be said, generally, that the aid of an Injunction will not be extended for the prevention of a nuisance, when it does not satisfactorily appear that the person aggrieved is without adequate remedy at law.⁶ The fact that the act threatened might be punished criminally as a nuisance, will not prevent

XIII; Hilliard, *Inj.*, Ch. IX; Joyce's Doctrines, 99; Spelling's Extraordinary Relief, Ch. VII.

¹ Act I of 1877, s. 56, cl. (g).

² High, *Inj.*, § 742; see also Beach, *Inj.*, § 1069; Spelling, *op. cit.*, § 392, as to contingent and speculative nuisance.

³ Joyce's Doctrines, 99; Spelling, *op. cit.*, § 377.

⁴ Beach, *Inj.*, § 1043.

⁵ *The Land Mortgage Bank of India v. Ahmedbhoj Habibbhoj*, I. L. R., 8 Bom., 53, 67, 70, 85 (1883).

(See also as to acquiescence and delay, Kerr, *Inj.*, 189; High, *Inj.*, § 756; Beach, *Inj.*, § 1061 and, generally, Joyce's *Inj.*, 99.) A person may also encourage another in the erection of a nuisance as not only to be disentitled to an Injunction, but also to relieve the adverse party from liability for damages at law; *Williams v. Earle of Jersey*, 1 Cr. and Ph., 91.

⁶ High, *Inj.*, §§ 745, 750, and Act I of 1877, s. 56, cl. (i).

the exercise of the restraining power of equity.¹ If, on the other hand, the injury is of so material a nature that it cannot be well or fully compensated by damages or is such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the Court by way of Injunction.² A mandatory Injunction is ordinarily the proper remedy in cases of continuing actionable nuisances.³ Relief by Injunction is sometimes granted where damages for the commission of the nuisance would be difficult of adjustment pecuniarily, thus rendering the remedy at law ineffectual.⁴ Though the Court will not interfere, if the damage is slight or accidental and occasional only, and the nuisance is merely of a temporary or occasional character, yet the damage, though in itself slight, may, from its continuance or from delay in removing it, or from constant repetition, become sufficiently substantial for the interference of the Court.⁵

The interference of the Court, in cases of prospective injury, very much depends upon the nature and extent of the apprehended mischief and upon the certainty or uncertainty of its arising or continuing; and the fact of the nuisance having commenced, raises a presumption of its continuance. Changes and improvements made at the eleventh hour, and the efficacy of which depend greatly on the good intention and constant personal care of the defendant and his servants, ought not

¹ *Ib.*; *People v. S. Louis*, 5 Gilm. 351 (Amer.); *Attorney-General v. Hunter*, 1 Dev. Eq., 12 (Amer.); *Joyce's Inj.*, 130.

² *Ib.*; *Kerr, Inj.*, 172, 173. "The loss of health and sleep, the enjoyment of quiet and repose and the comforts of home cannot be restored or compensated in money;"

per Thompson, J., Dennis v. Eckardt, cited in *Hilliard, Inj.*, 325.

³ *Lakshmi Narain Banerjee v. Tara Prosunno Banerjee*, 8 C. W. N., 710 (1904), and *see ib.* as to the right of abatement of nuisance.

⁴ *High, Inj.*, § 791; *Act I of 1877*, s. 54, cl. (b).

⁵ *Kerr, Inj.*, 173.

to influence the question of Injunction when once the nuisance is distinctly proved to have existed.¹ In determining whether the injury is serious or not, regard must be had to all the circumstances which may flow from it.²

A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of; and the fact that a stream is fouled by others is not a defence to a suit to restrain the fouling by one.³

The Court will not, in general, interfere, until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts, which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance.⁴ The probability that the act complained of is only something which may according to circumstances, or may at some considerable distance of time, prove a nuisance is not sufficient. To induce the Court to interfere there must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended danger will, if it comes, be irreparable.⁵ Any one seeking an Injunction to restrain an alleged future nuisance, whether public or private, must show a strong case of probability that the apprehended mischief will in fact arise.⁶

¹ *The Land Mortgage Bank of India v. Ahmedbhai Habibbhai*, I. L. R., 8 Bom., 66 (1883).

² *Goldamid v. Tunbridge Wells Commissioners*, 1 Ch., 349; *Atty.-Genl. v. Mayor, etc., of Basingstoke*, 45 L. J. Ch., 729.

³ *Crossley v. Lightowler*, L. R., 2 Ch., 478; *Joyce's Inj.*, 127.

⁴ *Kerr, Inj.*, 174, 175.

⁵ *Attorney-General v. Corporation of Manchester*, L. R., 1893, 2 Ch., 87, in which case the principles upon which the Court proceeds in granting or refusing Injunctions in *quia timet* actions, and the result of the authorities on this, and on nuisance at common law, were stated and discussed. See as to this case *Beach*,

+ 49 cal 1059

The fear of mankind though reasonable will not create a nuisance.¹

Where in a suit to restrain a nuisance from noise and smell it was conceded on the part of the plaintiff that there was no longer any noise to complain of, the Court observed that in many cases it would be right and the imperative duty of the Court to grant an Injunction to restrain the repetition of wrongful acts, even though those wrongful acts had already ceased.²

If the right is clear or fairly made out it is the duty of the Court to protect the property by Injunction until the hearing. If the right or the fact of its violation is doubtful, the case resolves itself into a question of comparative injury, whether the defendant will be more damnified by the Injunction being granted, or the plaintiff by its being withheld. Terms may be imposed on the plaintiff or the defendant as the condition of granting or withholding the Injunction respectively. After the establishment of the right and the facts of its violation, the plaintiff is entitled to a perpetual Injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case.³

The words of an Injunction against causing a nuisance ought not to be so drawn as to shut out all

Inj., § 1068. As to whether the Court has jurisdiction to award damages for an injury threatened only, see *Martin v. Price*, L. R., 1894, 1 Ch., 284. In cases governed by the Easements Act the Court has not such power. *Ganesham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 481; *Mitchell's Law of Easements*, 242, 243. In a case not governed by this Act the Court awarded damages in lieu of an Injunction for fu-

ture damage; *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252 (1887). See also *Holland v. Worley*, L. R., 26 Ch. D., 578.

¹ *Joyce's Inj.*, 99, *Spelling*, *op. cit.*, § 391.

² *Rapier v. London Tramways Company*, L. R., 1893, 2 Ch., 591, 592.

³ *Kerr, Inj.*, 175, 176, 190, *Spelling op. cit.*, § 417; *v. ante*, § 38, as to Injunction upon terms; as to the burden of proof, *v. ante*.

scientific attempts to attain the desired end without causing a nuisance.¹ Damages may be combined with a limited Injunction, when the circumstances of the case justify this particular form of relief.² In the same suit an Injunction may be obtainable as well as damages for the loss already incurred from the disturbance.³ When a plaintiff has proved his right to an Injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the defendant can best remove it; the plaintiff is entitled to an Injunction at once, and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to.⁴

In the case of nuisance by incorporated companies having compulsory powers to take lands and construct works, it has been held that they are bound to act in strict accordance with their powers. If they either act in excess of such powers and cause damage, or if, though keeping within their powers they construct their works in so unskilful or negligent a manner as to cause unnecessary injury to private rights, the parties aggrieved thereby may sue for damages, and, when such is the appropriate remedy, obtain an Injunction. If, however, the company keeps within its powers, no action is maintainable against them for any act done in the exercise of their authority, however injurious, provided the injury done is the necessary and inevitable result

¹ *Fleming v. Hislop*, L. R., 11 App. Cas., 686, and of course the decree must not be broader in its terms than the bill or complaint: *Beach, Inj.*, § 1073; the Injunction may be limited to a particular period, *Semper v. Foley*, 2 John & Hem., 555, 564.

² *The Land Mortgage Bank of*

India v. Ahmedbhai Habibbhai, I. L. R., 8 Bom., at pp. 77, 91 (1883); *v. ante*, pp. 145—147.

³ *Jamnadas Shankarlal v. Atmaraj Harjivan*, I. L. R., 2 Bom. 1833 (1877).

⁴ *Joyce's Doctrines: Atty.-Genl. v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch., 146.

of the exercise of the statutory powers and provided that the works have been executed with proper skill and care and in such a way as to cause no unnecessary injury to private rights. Where injury to private rights results from the construction of works which have been authorized and which have been executed with proper skill and care, the party injured must look for his remedy to the proviso for compensation, if any, within the statute authorizing the works, and, if there be no such proviso, he is without remedy. If an Act necessarily requires something to be done which cannot be done without creating a nuisance, or if, as to those things which may or may not be done under it, there is evidence on the face of the Act that the legislature supposed it impossible to be done somewhere, and under some circumstances without creating a nuisance, an action will not lie.¹ Where, however, the terms of a statute are not imperative, but only permissive, and it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer a license to commit nuisance in any place which might be selected for the purpose.²

¹ See for a recent example of this, *National Telephone Co. v. Baker*, 1893, L. R., 2 Ch., 186, 203. "The defendants are expressly authorized to use electrical power and the legislature must be taken to have contemplated it and to have condoned by anticipation any mischief arising from the reasonable use of such power:" *per Kekewich, J.*

² *Kerr, Inj.*, 176—189, *et ibi casus*.

See also *Harrison v. Southwark and Vauxhall Water Company*, L. R., 1891, 2 Ch., 409 (explaining and distinguishing *Fenwick v. East London Railway Company*, cited in *Kerr, Inj.*, 178); *Rapier v. London Tramways Company*, L. R., 1893, 2 Ch., 588; *National Telephone Company v. Baker*, L. R., 1893, 2 Ch., 186.

Where there is an express restrictive covenant against nuisance, annoyance, grievance and the like, the question is one not of nuisance, but upon the covenants, and the grant of an Injunction will be determined upon the principles regulating the issue of Injunctions in cases of breach of covenant and contract.¹

The doctrine of coming to a nuisance may be looked upon as exploded. A man is not precluded from maintaining an action by the fact that the business which creates the nuisance had been carried on before he took possession, and therefore the fact, that a man has come to a nuisance, does not disentitle him to relief by Injunction.²

In a recent case,³ which was one of nuisance by vibration and noise, Smith, L. J., said in his judgment:—“Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes, or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is, not to accede to the application, but to grant the Injunction sought, for the plaintiff's legal right has been invaded and he is *prima facie* entitled to an Injunction. There are, however, cases in which this rule may be relaxed and in which damages may be awarded in substitution for the Injunction as authorized by this section (s. 2, Lord Cairn's Act). In any instance in which

¹ *Tod Heatley v. Benham*, L. R., 40 Ch. D., 80.

² *Tipping v. St. Helens Smelting Co.*, 1 Ch., 66; *Kerr, Inj.*, 217.

³ *Shelfer v. City of London Electric Lighting Co.*, L. R., 1895, 1 Ch., 287.

⁴ *Ib.* at pp. 322, 323.

a case for an Injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an Injunction, the Court may award damages in its place: So, again, whether the case be for a mandatory Injunction, or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an Injunction, assuming a case for an Injunction to be made out. In my opinion it may be stated as a good working rule that—

(1) If the injury to the plaintiff's legal rights is small ;

(2) and is one which is capable of being estimated in money ;

(3) and is one which can be adequately compensated by a small money payment ;

(4) and the case is one in which it would be oppressive to the defendant to grant an Injunction,

then damages in substitution for an Injunction may be given.

There may also be cases in which, though the four abovementioned requirements exist, the defendant, by his conduct, as for instance hurrying up his buildings so as, if possible, to avoid an Injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an Injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication."

As every owner of land is under an obligation not to allow the branches of his trees to grow so as to overhang, or the roots of his trees to extend so as to penetrate his neighbour's land to the detriment of the latter in case of breach of such an obligation, it is open to the court to grant a mandatory injunction for the removal of the nuisance.¹

Nuisances in respect of natural rights.

§ 82. Natural rights are those rights which are treated by law as the ordinary incidents of property and annexed to land wherever it exists. They are part of the complete rights of ownership, whereas easements are acquired rights abstracted from the ownership of one—and added to the ownership of another. An infringement of those rights constitutes a nuisance.

1) Air.

Every one has a right *in rem* to be secured from annoyance whether from smells, noises or other sources of discomfort. It is the right of every owner of land to have the use of the air in its natural state free from such annoyances, and that the air passing to such land shall not be unreasonably polluted by other persons.² This, of course, does not mean that a person is entitled to absolute purity of air, for such a right would be incompatible with the exercise by others of ordinary and necessary acts and pursuits of life. The law does not regard trifling nuisances. In this connection unpolluted air means air of such a degree of purity that it is not rendered incompatible with the physical comfort of human existence.³

¹ *Lakshmi Narain v. Tara Prasad*, I. L. R., 31 Cal., 944 (1904).

² Act V of 1882 (Easements), s. 7, illa. (b), (c). *Aldred's Case*, 9 Coke, 58. Innes, *Principles of Torts*, 194; *Bagram v. Khettranath Karformak*, 3 B. L. R., O. C. J., 43 (1869). See *High, Inj.*, §§ 772, *et seq.*; *Kerr, Inj.*,

1891, *et seq.*; *Beach, Inj.*, § 1096.

³ *Land Mortgage Bank of India v. Ahmedbhai Habibbhai*, I. L. R., 8 Bom., 54 (1883); citing *St. Helens Smelting Co. v. Tipping*, 11 H. L. C., 642; *Walter v. Selfe*, 4 DeG. & Sm., 315.

The right is not violated unless the annoyance is such as materially to interfere with the ordinary comfort of human existence.¹ Every owner has also the right to so much light and air as pass vertically thereto.² There is, however, no natural right to light or air coming laterally. Such a right can only be acquired as an easement.³

As instances of the infringement of the right now considered the following may be cited:—*A* rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier *B*. The latter may sue for an Injunction restraining *A* from making the noise.⁴ Relief also may be claimed against vibration.⁵ Again, if *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and *C* who carry on business in a neighbouring house, the latter may sue for an Injunction to restrain the pollution.⁶ Injunctions may also be granted to restrain nuisances from smell;⁷ burning of refuse;⁸ radiation of heat;⁹ the carrying on of noisy and offensive trades and the like.

¹ *Crump v. Lambert*, L. R., 3 Eq., 413. See *Bamford v. Turnley*, 3 B. & S., 83. Goddard's Easements, 5th Ed., 47.

² Act V of 1882, s. 7, ill. (d).

³ *Chasteley v. Ackland*, 1895, 2 Ch. 389, 402; *Sarubai v. Bapu Narhar Sohoni*, I. L. R., 2 Bom., 660 (1878).

⁴ Act I of 1877, s. 54, ill. (e). See *Lambton v. Mellish*, 1894, 3 Ch., 163 (Injunctions against noise caused by organs); *Broder v. Saillard*, 2 Ch. D., 692; *Ball v. Ray*, L. R., 8 Ch. App., 467 (noise caused by horses in adjoining stable); *Christie v. Davey*, L. R., 1893, 1 Ch., 316 (noise made maliciously).

⁵ *Scott v. Firth*, 4 F. and F., 349; *Grosvenor Hotel Company v. Hamill-*

ton, L. R., 1894, Q. B. D., 836; *Heather v. Pardon*, 37 L. T. N. S., 393.

⁶ Act I of 1877, s. 54, ill. (f); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy*, I. L. R., 8 Bom., 35 (1883) [suit for Injunction to restrain a nuisance caused by the working of the defendant's cotton mill, creating dust and cotton fluff, and for damages].

⁷ *Rapier v. London Tramways Co.*, L. R., 1893, 2 Ch., 588.

⁸ *Fleming v. Hislop*, 11 App. Cas., 686.

⁹ *Reinhardt v. Mentasti*, L. R., 42 Ch. D., 685; *Robinson v. Kilvert*, L. R., 41 Ch. D., 88.

There must, however, be not merely a nominal but a sensible and real damage before the Court will interfere. Whether or not the injury is substantial enough to induce the Court to exercise its protective jurisdiction is a question which must depend upon the particular circumstances of the case. It is impossible to find any precise standard by which to determine the question. Each case must depend on evidence as to the amount and nature of the nuisance. Though the right to corrupt and pollute the air may be acquired as against an individual, no length of time will legalise a public nuisance or enable a party to prescribe for its continuance.¹ In the undermentioned case plaintiff's beams overhung defendant's soil and defendant erected a building which overhung those beams. A question having arisen as to whether the beams gave the plaintiff a right to the column of air above them *held cujus est solum ejus est usque ad caelum* and the diminution in the defendant's rights by reason of the beams did not extend beyond the protrusion of the beams themselves.²

(ii) Light.

Every one has a natural right *in rem* to secure *vertically* the light appertaining to the situation of his tenement. He has no natural right to the light laterally appertaining to it, except by grant or prescription.³

ii) Water.

A person by or through whose premises water flows from other persons' premises has certain natural rights therein. The rights are, in all streams, to have the water reach him undeteriorated in quality.⁴ It is the right of every owner of land that within his own limits,

¹ Kerr, *Inj.*, 211—217.

² *Bunchod v. Abdula Bhai*, I. L. R., 28 Bom., 428 (1904).

³ Act V of 1882, s. 7, ill. (d); *Bagram v. Khettranath Karjormah*,

3 B. L. R., O. C. J., 43 (1889); *Innes, op. cit.*, 196; *Underhill, op. cit.*, 249.

⁴ *Innes, op. cit.*, 191; *Beach, Inj.*, §§ 1111, *et seq.*

the water which naturally passes or percolates by, over, or through his land shall not before so passing or percolating be unreasonably polluted by other persons.¹ And in natural streams having a defined course², and flowing on or below the surface in such defined course, there is a right to have an unobstructed flow from above and below, to have the stream not unreasonably diminished in quantity, and to enjoy a reasonable use of the water of the stream.³

These rights are limited to natural streams, that is, streams flowing at their sources by the operation of nature and in a natural channel. Rights in artificial streams are not natural rights but easements.⁴ The right to affect the quality, the quantity, or the flow of water, in a manner not justified by natural right, is an easement, and is therefore subject to the general law of easements. Injunctions will be granted to protect the legal right to the proper flow of water in a natural stream, as also against the fouling and pollution of water.⁵ Other nuisances connected with rights in water may be here mentioned, namely, nuisance to the public right of navigation, nuisance to fishery and the like.⁶ So long as water is allowed to flow in substantially the same way as before, there is no disturbance of natural

¹ Act V of 1882, s. 7, ill. (f).

² As to water not flowing in a defined channel, see *Bunsee Sahoo v. Kali Pershad*, 13 W. R., 414 (1870); *Robinson v. Ayya Krishnama Char-yar*, 7 Mad. H. C., 46 (1872); *Hari Mohun Thakur v. Kissen Sundari*, I. L. R., 11 Cal., 52 (1884).

³ *Innes, op. cit.*, 192; *Underhill, op. cit.*, 258; Act V of 1882, s. 7, illa. (g), (h), (i), (j); *Atkur Ali Khan v. Sekundur Ali Khan*, 4 W. R., 28; *Court of Wards v. Rajah Leelanund*

Singh, 13 W. R., 48 (1870); *Baboo Chumroo Singh v. Mullick Khyrub Ahmed*, 18 W. R., 525 (1873).

⁴ *Morgan v. Kirby*, I. L. R., 2 Mad., 46 (1878); *Rameshar Pershad Narain Singh v. Koonj Behari Pat-tak*, I. L. R., 4 Cal., 633 (1878).

⁵ *Kerr, Inj.*, 257—260, and see generally *ib.*, 236—262.

⁶ See *High, Inj.*, §§ 794—815; *Kerr, Inj.*, 262—266; and the *Law of Riparian Rights* by Lal Mohan Dass (Tagore Law Lectures, 1889).

right giving rise to a cause of action, but user which amounts to complete diversion of the stream is unreasonable and may be restrained by Injunction.¹ Each recurring act of disturbance creates a fresh cause of action,² and the burden of proof is on the person claiming invasion of natural rights.³

(iv) Support.

Every owner of land has a right that such land in its natural condition shall have the support naturally rendered by the subjacent and adjacent soil of another person.⁴ The land is in its natural condition when it is unburdened by building or other weighty object which may be built or set upon it. The natural right to support, though it cannot be increased by the erection of buildings or by otherwise increasing the weight and pressure of the land upon the subjacent or adjacent ground, (a right to any such increment, of support being acquirable only as an easement), on the other hand is not lost or diminished by any such addition of weight or pressure. By virtue of the natural right a person is not inherently entitled to more support than is necessary to prevent the soil, if unburdened with buildings, from falling in.⁵ The right of support is one existing by reason of vicinage and is very varied, as the right of support of land by land, of buildings by land, or of buildings by buildings. Its consideration may be divided into the lateral support of land by adjacent land, the vertical support of the

¹ *Directors of Swindon Waterworks Co., Ltd. v. Proprietors of the Wills and Berks Canal Navigation Co.*, L. R., 7 E. & L., App., 697.

² *Court of Wards v. Rajah Leelamund Singh*, 13 W. R., 48 (1870).

³ *Hari Mohun Thakur v. Kissen Sundari*, I. L. R., 11 Cal., 52 (1884); *Onrad v. Kishen Soondaree*

Dassei, 15 W. R., 83 (1871); *Bickett v. Morris*, L. R., 1 H. L., Sc., 47; *Obhoy Churn Dey v. Lukhy Monee Bewa*, 2 C. L. R., 55.

⁴ Act V of 1882, s. 7, ill. (c).

⁵ *Kerr, Inj.*, 220—235; *Mitchell's Law of Easements*, 26—30; *Innes, op cit.*, 195, 196; *Underhill, op. cit.*, 243.

surface by the subsoil (where the property in the two is distinct), the support of buildings, vertically, by subjacent soil, the support of buildings laterally by adjacent soils, and the support of buildings in juxtaposition. In some of these instances the right is a natural right; in others it is an acquired right, that is, an easement. It would be beyond the scope of this work to enter upon a consideration of all these instances of the right of support, or to discuss the various incidents of such right. In all cases, however, an Injunction (either temporary or perpetual) may be an appropriate or necessary relief. The right of support is pre-eminently one for the protection of which an Injunction may be an essential relief; and this either before or after there has been a decision upon the existence of such a right in any particular case. It is obvious that the invasion of such a right, when it exists, may work irreparable mischief, and that, prior to any decision upon it, far less inconvenience or probable damage will generally arise from granting than from refusing a temporary Injunction. A reasonable probability of damage is a sufficient ground for an Injunction.¹ So (the right to lateral support being an incident to the ownership of land; and its infringement a nuisance), the removal and excavation of earth upon adjacent premises in such manner as to endanger the stability of the complainant's soil and fences, by removing their lateral support, will be enjoined.² The following instance of the grant of an Injunction given by the Specific Relief Act may also be here cited, though it is really an illustration of trespass: *A* and *B* are in possession

¹ Collett's Specific Relief Act (first ed.), 313, 314.

² High, Inj., § 753; as to the date

when the cause of action arises see *Jacatri v. H. A. Emile*, I. L. R., 13 All., 98 (1890).

of contiguous lands and of the mines underneath them. *A* works his mine so as to extend under *B*'s mine and threatens to remove certain pillars which held to support *B*'s mine. The latter may sue for an Injunction to restrain him from so doing.¹

Nuisances in
respect of
easements.

§ 83. A right of easement is as much the property of a person as the house in respect of which it is enjoyed;² and the infringement of that right entitles the person injured to compensation in damages, and in appropriate cases to an Injunction. The law of easements for the territories respectively administered by the Governors of Bombay and Madras, the Lieutenant-Governor of the North-West Provinces and the Chief Commissioners of the Central Provinces, Oudh and Coorg is contained in the Indian Easements Act which is in the main and with some exceptions a codification of the English law on the subjects of easements and *profits à prendre* appurtenant.³ The law for the rest of British India is partly contained in the Indian Limitation Act;⁴ the remaining portion of the law relating to easements is mainly the same as the English law relating thereto.

Whereas natural rights are rights inherent in the possession of land belonging to every owner as a matter of course, easements are either created at the will of a land-owner affected by them for the benefit of a neighbour or otherwise acquired by one person as against other person

¹ Act I of 1877, s. 54, ill. (r). A stronger case is required where the damage is merely threatened than where some damage has actually occurred: *Corporation of Birmingham v. Allen*, 6 Ch. D. 287, 288.

² *Pranjivandas Harjivandas v. Marjim Semaldas*, 1 Bom. H. C. R., 156 (1863).

³ See Acts V of 1882 & VIII of

1891; Mitchell's Law of Easements in India, 2nd Ed., 1898. The author is also obliged for some of the matters in this chapter to the learned Tagore Professor for 1899, Mr. F. Peacock, who has kindly allowed him to see the synopsis of his lectures on the law of Easements in British India.

⁴ Act XV of 1877, ss. 26, 27.

who is a landholder. In English law an easement is a privilege without profit, and therefore the right known as a *profit à prendre* is not an easement. In this country, however, the latter word has a more extensive meaning, since in those portions of India governed by the Easements Act it includes a *profit à prendre* appurtenant, that is, annexed to the ownership of immoveable property known prior to Act XV of 1877 as "an interest in immoveable property appurtenant to land;"¹ and in the portions not so governed it includes a *profit à prendre* in gross, that is, one not appurtenant to property and which can be enjoyed by a person not in the possession, enjoyment, or occupation of any dominant tenement.² Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.³ Easements may be acquired by express or implied grant, by presumed grant or operation of law (such as easements of necessity and *quasi-easements*) by custom and prescription.⁴

It would be beyond the scope of this work which deals with a form of procedure only to treat of the substantive law relating to easements. It may, however, be shortly stated that whatever be the nature of an easement and whatever be the mode in which it has been acquired, an Injunction is an available and common remedy in appropriate cases for its infringement.⁵ The general principles on which the jurisdiction of equity to restrain the violation of easements is based are similar to those which

¹ Act V of 1882, s. 4.

² *Chundee Churn Roy v. Shib Chunder Mundul*, I. L. R., 5 Cal., 945 (1880).

³ See Act V of 1882, s. 24, in *Hayagueva v. Sami*, I. L. R., 15 Mad., 286 (1891).

⁴ As to the last and common mode of acquisition see Act V of 1882, s. 15; Act XV of 1877, ss. 26, 27.

⁵ As to easements of necessity and *quasi-easements* see Act V of 1882, s. 13. The law as to easements of necessity is the same in those parts of India where the Easements Act is not in force. *Charu Surnokar v. Dokouri Chunder Thacoor*, I. L. R., 8 Cal., 956, 958; cls. (b), (d) & (f), deal with *quasi-easements*. In cl. (d) there is a departure from English law. See Mitchell

constitute the foundation of the relief against nuisances. Indeed, so closely allied are the two subjects that it is difficult to draw the line between what constitutes a violation of an easement and what a nuisance. In a generic sense every violation of an easement may be considered as a nuisance, although the converse of the proposition does not hold true. In both cases to warrant the interposition of equity, an irreparable injury must be made to appear which is not susceptible of adequate compensation in pecuniary damages, or which from the nature of the case would occasion a constantly recurring grievance, such as loss of health, trade, business or destruction of means of subsistence.¹ The protection of easements in the widest sense of that term probably constitutes one of the most important heads of jurisdiction by Injunction.² The commoner and most important easements are those relating to air,³ light,⁴ support,⁵ water,⁶ and way.⁷ In

op. cit., 83, and *Chunilal Mancharam v. Manishankar Aitaram*, I. L. R., 13 Bom., 616 (1893). The rule enacted by cl. (f) as to easements created on a partition of joint property is applicable in parts of India where this Act is not in force. *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., O. C. J., 181, 185 (1871); *Modhsoodun Dey v. Bisemath Dey*, 15 B. L. R., 361, 367 (1875); *Charu Surnokar v. Dokouri Chunder Thacoor*, supra; *Purshotam Sakharam v. Durgaji Tukaram*, I. L. R., 14 Bom., 452 (1890). The case of transfer by contemporaneous conveyances or devises has not been provided for by the section, but the law in India is the same as that in force in England on this point. *The Delhi and London Bank, Limited v. Hem Lal Dutt*, I. L. R., 14 Cal., 839, 853 (1887). As to

two tenements held under leases from the same landlord see *Robson v. Edwards*, L. R., 1893, 2 Ch., 146; Act I of 1877, s. 54, ill. (j). As to Injunctions in cases of easements acquired by grant, prescription or custom *v. post.*

¹ High, Inj., § 848, *et seq.*; and see generally as to Injunctions in cases of easement, Kerr, Inj., Ch. VI. Beach, Inj., Ch. XXVII; Joyce's Inj., pp. 424, 452—463; Joyce's Doctrines, 205; Hilliard, Inj., Ch. XXVII; Spelling's Extraordinary Relief, § 219, *et seq.*

² Spelling, *op. cit.*, § 219 :

³ Act V of 1882, ss. 15, 28, 33; Act XV of 1877, s. 26.

⁴ *Ib.*

⁵ *Ib.*; (and s. 34, Act V of 1882).

⁶ *Ib.*

⁷ *Ib.*

India, having regard to the mode of life and usages of the country, the right of privacy is one of importance and is acquirable by custom.¹ The easements named and the issue of Injunctions against their infringement form the subject-matter of the remaining portion of this Chapter.

Owing to conditions of climate and mode of life, English law has not regarded as of equal value the rights to light and air.² The right to have air coming to an ancient window or other aperture in a building is an undisputed right, but a right by way of easement to the access of air over the general unlimited surface of a neighbour cannot be acquired by mere enjoyment, and so it has been held that there is no right that the owner of a windmill shall have the streams of wind accustomed to flow over neighbouring land to his mill uninterrupted, and that the access of air to the chimneys off a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property or as an easement. The distinction appears to be that as the window or other aperture is capable of receiving the air in a definite direction only and in a definite quantity and only requires an open space for a short distance, and as the claim is limited and the enjoyment capable of obstruction by reasonable means, the Court will presume in the case of an ancient window an easement. The converse right that the air in a building should be allowed to escape through or over an adjoining property for the purpose of ventilation is also an easement. The natural right which a person possesses that the air which passes over his land shall not be polluted by others has already been mentioned,³ but an adverse right to

¹ Act V of 1882, s. 18, ill. (b).

Times, March 13, 1887, pp. 433-436.

² As to the right to air see *Law*

³ v. *ante*, § 82.

pollute the air may be acquired, and when acquired is an easement.¹

Easements of light and air differ as to their mode of acquisition, for whereas light can only be acquired under the Prescription Act, a prescriptive right to air can only be gained under the common law—no mention having been made of such right by the Act.² Though the right of light and air are different and are acquired by different means, it is a frequent though erroneous practice to couple them together as if they were one and the same easement, or as if they were at all events so connected that where there was the one, there was also the other. The only real point in common is that they both exist in connection with windows and other openings in the walls of houses. The nature of the case which would have to be made in an English Court for an Injunction by reason of the obstruction of air is *toto cælo* different from a case of light. Cases are very rare indeed and must be very special, such as to involve danger to health or something very nearly approaching to that, to justify the interference of the Court on the ground of the diminution of air.³

The access of air is in this country of hardly less importance than in that of light,⁴ in fact having regard to the way in which daylight is sedulously excluded in this country, and to the almost perpendicular rays of the sun in nine out of twelve months,⁵ it may be said to be even of greater importance. It must be taken as a

¹ Goddard on Easements, 5th ed., 39—47.

² *Ib.*, 263.

³ *City of London Brewery Company v. Tennant*, L. R., 9 Ch. App., 218; Goddard, *op. cit.*, 444, 445; Kerr, Inj., 21; *Aldin v. Latimer*, *Clark Muirhead & Co.*, L. R., 1894,

2 Ch., 445; as to ventilation see *Bass v. Gregory*, 25 Q. B. D., 481.

⁴ *Nandkishor Balgovan v. Bhagubhai Pranballabhdas*, I. L. R., 8 Bom., 95, 97 (1883), *per West, J.*

⁵ *Barrow v. Arches*, Cor. 9, 11, *per Peterson, J.*

matter of common knowledge that a material interference with it is injurious, not only to the comfort, but to the health of the inmates of the house thus affected,¹

The Calcutta High Court, however, has followed the English law as above stated.

The application in this matter of this law leads to some inconvenience.² In the case last cited Markby, J., observed as follows :—“The reasons for which apertures are made in the walls of houses in the two countries are very different. In England an aperture is made chiefly for light; the sun being less bright, and the air colder there, we desire to obtain all the light we can; and only to admit just so much air as is necessary for wholesome ventilation; for which reason we always use glass in our windows. In this country the object is preceisely the reverse—to get as much air as possible, and to exclude the superfluous light. A comparatively small aperture will in this country light a room; but without a free current of air a room would very often be uncomfortable, and even unhealthy. Hence the frequent omission of glass, and the numerous contrivances of verandahs, jilmils, chicks, hoods and so forth, which are all intended to shut out the light, whilst the air is admitted. But unfortunately the law of England being fashioned upon the wants of the inhabitants of that country has specially favoured the acquisition of the right to free access of light, but has taken very little notice of the right to free access of air. Light and air have indeed very often been treated as one and the same easement; the right being looked upon as the right to have the aperture unobstructed, the owner using it for whatever purpose he pleased. This was the mode in

¹ *Nandkishor Balgovan v. Bha-jubhai Pranballabhadras*, *supra*.

² *Modhoooodun Dey v. Bissonnuth Dey*, 15 B. L. R., 361, 367 (1875).

which I dealt with the case when assessing the damages in *Bagram v. Khettranath Karformah*,¹ but the Court of Appeal took a different view. As I understand Sir Barnes Peacock's judgment, he considers that the right to air stands now, as it did when *Allred's case*² was decided upon the ground of health, and that the Court interferes upon the ground of nuisance.³ This no doubt is in strict accordance with the English law. It is the same view as was taken by Lord Hatherly (then V. C. Wood) in *Dent v. The Auction Mart Co.*,⁴ where he says :—"There are difficulties about the case of air as distinguished from that of light, but the Court has interfered to prevent the total obstruction of air." He then states that the obstruction in that particular case was one which the Court would recognize 'on the ground of nuisance' and adds 'this is perhaps the proper ground on which to place the interference of the Court, although in decrees the words 'light and air' are often used together as if the two things went *pari passu*. I think, therefore, I am bound by authority to hold that, in Calcutta, as under the English law, independently of Act IX of 1871, *the only right which can be gained in respect of air is that there shall not be an obstruction which is a nuisance or injurious to health*.⁵

Wherever in India the Easements Act is in force the right to air and the remedies for its infraction are enlarged beyond the limits within which they are confined by the Bengal decisions above cited and are made as extensive

¹ 3 B. L. R., O. C. J., 18.

² 9 Rep., 59.

³ "In other words to render the house unfit for the ordinary purposes of habitation or business" per Sir Barnes Peacock in *Bagram v. Khettranath Karformah*, supra.

⁴ 1 R., 2 En., 238, at page 252.

⁵ *Modhoocondun Dey v. Bisno-*

nauth Dey, supra, followed. *The Delhi and London Bank, Ltd. v. Hem Lal Dutt*, 1 L. R., 14 Cal., 839 (1887). [The Court in the last-mentioned case (citing *Barrow v. Archer*, 2 Hyde, 129) said where there is sufficient adit for light it will be presumed there will be sufficient adit for air, at p. 840.]

as the right and remedies in respect of light. For a suit for damages is maintainable for disturbance of easements provided that the disturbance has actually caused substantial damage to the plaintiff. And where the easement disturbed is a right to the free passage of air to the openings in a house damage is substantial, if it interferes materially with the physical comfort of the plaintiff though it is not injurious to his health.¹ Subject to the provisions of the Specific Relief Act, sections 52—57 both inclusive, an Injunction may be granted to restrain the disturbance of an easement—(a) if the easement is actually disturbed, when compensation for such disturbance might be recovered under this Act; (b) if the disturbance is only threatened or intended, when the act threatened or intended must necessarily, if performed, disturb the easement.²

It is immaterial whether light and air are admitted through a window or a door. In case of obstruction, the owner of the dominant tenement is in either case entitled to protection. The only question is whether there is an aperture capable of admitting light and air and such aperture will confer the same legal right, whether it be used exclusively for the passage of light and air and be termed a window or is intended to be used as a means of communication and called a door. This is more particularly the case in this country, where, perhaps, except during the monsoon, a door and a window are almost the same, so far as the admission of light and air is concerned.³

In conformity with the English rule upon the point, a right to unobstructed access of the south breeze, or any other wind, as such, has been held not to be acquirable, by

¹ Act V of 1892, s. 33, and explanation III to this section: Mitchell's Law of Easements, 215.

² *Ib.*, s. 35.

³ *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., O. C. J., 181, 190 (1871).

prescription, though it might be acquired by express grant, by the law of India as it stood before Act IX of 1871,¹ or under that Act, or Act XV of 1877.² In the case of *Barrow v. Archer* already cited the Court observed as follows :—“A plaintiff cannot vest his title to the enjoyment of light and air (not on the principle that if the light be sufficient, the access of air will be presumed to be sufficient) on the assumption of a principle that having regard to the climate a party gets a right to the south wind and that the right to light must go to the extent that independently of the light being sufficient, he is entitled to a current of air the same as a current of water and that to the extent of such a current he is entitled to be free from all obstruction. Such a claim is in fact an assertion that a plaintiff gains by prescription a right to have the current of air impinge direct upon his premises in the direction the wind blows, and that it is not sufficient that he gets air ample and sufficient for all sanitary purposes, but that he gets it in the direction from which it blows, undirected by any obstruction and is in fact co-extensive with a claim to a prospect the right to which has been held not to exist.³ Were such a principle to be upheld, the consequences would be that to prevent an acquisition of right, the owners of adjoining property on all sides would be compelled to build up against a party, in order to prevent his getting a right to the absence of everything, that could obstruct the direct impinging of the wind.”⁴ Where it was urged that the Court should decide the question as to the existence of

¹ *Barram v. Kheltranath Karlon-mah*, 3 P. L. R., O. C. J., 46 (1869); *Barrow v. Archer*, Cor. 9, 11 (1864).

² *Delhi and London Bank, Ltd. v. H-m Lill Duff*, I. I. R., 14 Cal., 830, 854 (1887).

³ See *Atty.-Genl. v. Doughty*, 2 Ves., n. 452.

⁴ *Barrow v. Archer*, Cor. 9, 11 (1864) [following *Webb v. Bird*, 1 C. B. N. S., 268].

such a right, not on the English cases but according to the circumstances of this country, and the particular winds prevailing, and that a direct breeze from the south was almost a necessity, it was held that it was equally necessary for the Court to see that in studying luxury and comfort it did not make the subservient tenement subservient to more than the law requires, especially as the easement gained is a curtailment of the legal rights of the owner of that tenement.¹

In coming to a decision whether a building will or will not diminish the air entering the dominant tenement, the Court may consider the circumstance of the building being on the south side, from which the air comes during the hottest season of the year.²

The right to an Injunction is of course measurable and limited by the extent of the right sought to be protected. From the foregoing paragraph it will have appeared that while under the Easements Act an Injunction may be obtained to restrain the obstruction of air if such obstruction interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health, in other cases the Court interferes upon the ground of health, and in order to justify an Injunction the obstruction must amount to a nuisance. In either case the principles regulating the exercise of protective jurisdiction are those which exist for the prevention of all torts and are contained in the Specific Relief Act. (ii) Injunctions against obstruction of air.

There may be circumstances in a case such as to justify the Court in holding that a covenant not to interrupt the free passage of air to the house of a neighbour may be implied.³

¹ *Ib.*

² *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8

Bom. H. C. R., 181, 190 (1871).

³ *Holl v. Lichfield Brewery Co.*, 49 L. J., Ch., 655; Kerr, Inj., 211.

(iii) Light.

“Every man on his own land has a right to all the light and air which will come to him and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of light by mere occupancy. After he has erected his building the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period.”¹

To acquire by prescription a right to the uninterrupted access of light and air through the windows of a dwelling-house, it is sufficient that the building in respect of which the right is claimed has assumed the appearance and outward aspect of a dwelling-house for more than twenty years before the time of the commencement of the suit, though not completed or used as a dwelling-house for the full period of twenty years before that time. When a building is so far completed as to show an intention to use it as a dwelling-house with certain windows or openings for light and air, from that time it becomes the duty of those who are concerned in preventing a prescriptive

¹ *Pranjivandas Harjivandas v. R., O. C. J., 151, note (1863)*
Mayaram Samaldas. 1 Bom. H. C.

right to the access of light and air from arising in respect of such windows to take steps to challenge and hinder the acquisition of such right.¹

The owner of a house, the light coming to which is obstructed by an erection made upon adjoining land by a person who, *quâ* such adjoining land is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light. But where the person causing such obstruction is the rightful owner of the adjoining land or acting with the permission of the owner, no such action as aforesaid will lie against him, unless the plaintiff has acquired an easement.²

A person has an absolute and indefeasible right under section 26 of the Limitation Act to have substantially the same amount of light enter his room through the particular apertures through which it had always passed, or to be indemnified for the diminution of the light caused.³

The full prescriptive right to light is thus the right to so much light as has flowed through the particular aperture or apertures during the prescribed period. But the right in respect of the remedy for its infringement is subject to limitation and, therefore, the remedy for disturbance of a prescriptive right to light depends upon the obstruction of such light as is sufficient for the comfortable use and enjoyment of the dominant tenement if a dwelling-house, or for its beneficial use and occupation if a place of business.

¹ *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. H. C. R., O. C. J., 148 (1863); see *Bhuban Mohun Banerjee v. Elliott*, 6 B. L. R., 85 (1870) as to the use of shutters on windows, see *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 480 (1894).

² *Dhuman Khan v. Muhammad Khan*, I. L. R., 19 All., 153 (1898).

³ *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 676 (1889). If the property has been diminished in value, the plaintiff is entitled to recover damages, *Lackersteen v. Tarucknath Poramanick*, Cor., 92 (1864).

It is not every speculative exclusion of light or even sensible diminution of light that gives a right of action, but such a diminution of light as really makes the premises to a sensible degree less fit for occupation or business.¹

“Sir Barnes Peacock lays down substantially the same rule as to interference with light as was laid down by Lord Cranworth in *Clarke v. Clarke*² and was adopted by the Lords Justices in *Robson v. Whittingham*.³ In *Bagram v. Khettranath Karformah*,⁴ it is said: ‘It would be unreasonable to presume that the owner of the servient tenement intended to grant a right to the use of more light than was necessary for the comfortable and convenient habitation of the dwelling-house or that he intended to increase the value of his neighbour’s house by reducing the value of his own land. Principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for comfortable habitation, but they do not require such a presumption as would impede the erection of buildings on the servient tenement which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation.’

The case of *Bagram v. Khettranath Karformah*⁵ lays down the law independently of the Indian Statute in accordance with the English Chancery decisions independently of the English Statute; and this I must accept

¹ *Barrow v. Archer*, Coryton, 11 (1864); and see *Bagram v. Khettranath Karformah*, 3 B. L. R., O. C. J., 54. “There is no injury if the plaintiff has still as much light as is necessary for the comfortable

habitation of the house.”

² L. R., 1 Ch., App., 16.

³ L. R., 1 Ch., 442.

⁴ 3 B. L. R., O. C., 18 at p. 50 (1869).

⁵ *Ibid.*

as the law of Calcutta also, namely, that by enjoyment only the right to so much *air* can be gained as is necessary to avoid a nuisance, *and only the right to so much light as is necessary for comfortable habitation.*"¹

A plaintiff is entitled to stand on his right and not to depend upon the degree of consideration which the defendant may show him from time to time. So it is no answer to say that there will be reflected light from the wall of the new and obstructing building when it is whitewashed. A plaintiff is not bound to put up with reflected light even if it would not be incomparably less than the direct sky-light; moreover, there is no means of ensuring the wall being kept whitewashed, or in a state to reflect light.² When a room was made so dark that the plaintiff opened a sky-light which helped to illuminate all the rooms at date of suit, the Court observed that a person was not bound to open a sky-light in his roof because his neighbour blocks the light and air out.³

The right to unobstructed light is not diminished by the circumstance that the possessor of that right has either by purchase from, or by the free gift of, any other person, or

¹ *Modhoooodun Dey v. Bissonath Dey*, 15 B. L. R., 370, 371 (1875); and see *Benode Coomaree Dassee v. Soudaminey Dossee*, I. L. R., 16 Cal., 256, 257 (1889) [a person is entitled to so much use and access of light as is reasonably necessary for the comfortable habitation of his premises, and to so much of the use and access of air as may be necessary to prevent his premises being rendered unfit for habitation or business]. See also *The Delhi and London Bank v. Hem Lal Dutt*, I. L. R., 14 Cal., 839 (1887); *Jamnadas v. Atmaram*, I. L. R., 2 Bom., 133 (1877). There are cases in which the Court will interfere when the obstruc-

tion is slight and injury trifling, but these are very rare and depend upon exceptional circumstances, Coddard on Easements, 476.

² *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181, 191, 192 (1871) citing *Straight v. Burn*, I. L. R., 5 Ch. App., 163; and *Dent v. Auction Mart Co.*, I. L. R., 2 Eq., 238; *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 479 (1894); [but see also *ib.*, p. 485 in appeal]. *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 256 (1888).

³ *Lackersteen v. Paramanick*, Cor., 92 (1864).

by the operation of any Act of the Legislature obtained other light in addition to that which he had a prescriptive right to.¹ The owner of ancient lights may improve his light but must not increase it.²

Where there was a roof to the plaintiff's verandah, not of a permanent character, built by the orders of the plaintiff himself, the effect of which was to intercept the direct sky-light, and it was contended by the defendant that, as the plaintiff had diminished his light and air by his own act, the question of material diminution of comfort must be determined with regard to that diminished light; it was held that as the evidence showed that the plaintiff had put a covering to the wooden rafters which could be placed or removed according to circumstances, he had done nothing which could be deemed equivalent to a surrender of his light, or disentitle him to the same amount of light and air as he enjoyed when he first took possession of the property. A person may wish to accommodate the light and air to the season of the year, but that is no reason why he should be deprived of it at all times.³ So the fact that a window is not often opened, and that in the monsoon windows are closed at the foot by *dammars* and tiles to keep out the wet, is not an objection, as a plaintiff may regulate his use of his windows any way he likes.⁴

Under the Easements Act also a suit for disturbance of easement will lie, provided that the disturbance has actually caused substantial damage to the plaintiff: that is,

¹ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 478, following *Dyers' Co. v. King*, L. R., 9 Eq., 438, 442.

² *Tapling v. Jones*, 11 H. L., 290; see *Lackersteen v. Paramanick*, Cor. 92 (1864); *Provabutti Dabee v. Mohendro Lall Bose*, I. L. R., 7 Cal., 453 (1881); as to new building, erected

on site of an ancient building, see *Pendarres v. Munro*, L. R., 1892, 1 Ch., 611.

³ *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181, 190, 191 (1871).

⁴ *Dhunjibhoy Cowasji Umrigar v. Listoa*, I. L. R., 13 Bom., 252, 254 (1888).

where evidence of the easement is affected, or the value of the dominant heritage is materially diminished, or the damage interferes materially with the physical comfort of the plaintiff or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.¹

Kekewich, J., in a recent case² has summarised the law relating to the remedies available upon obstruction of light as follows: "There are two classes of cases. If you interfere with the access of light to a man's window to the extent of 2 per cent., or 3 per cent., or even perhaps 10 per cent., or more, where it enters in large quantities the Court declines to interfere. Sir George Jessel used to say that was a case in which no action could be maintained either in law or in equity. No jury would give damages, and the Court of Chancery would not grant an Injunction. Then there is a second class of cases, where there is an interference of light of a serious character, but yet not really a practical interference with the comfortable enjoyment of the plaintiff's premises. For that probably small damages would be sufficient. Then there is a third class of cases, where the interference is of a grosser kind; there, of course, an Injunction would follow with costs."

If a landlord conveys one of two closes to another he cannot afterwards do anything to derogate from his grant.³ But the maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee.⁴

¹ Act V of 1882, s. 33.

² *Lazius v. Artistic Photographic Company*, 1897, L. R., 2 Ch., 218.

³ *Aldin v. Latimer Clark Muirhead*

& Co., L. R., 1894, 2 Ch., 442.

⁴ *Birmingham Dudley & District Banking Co. v. Ross*, 38 Ch. D., 296.

(iv) Injunctions against obstruction of light.

According to section 35 of the Indian Easements Act (which substantially expresses the rule applicable in territories to which the Act does not extend) subject to the provisions of the Specific Relief Act relating to Injunctions, an Injunction may be granted to restrain the disturbance of an easement (a) if the easement is actually disturbed, when compensation for such disturbance might be recovered; (b) if the disturbance is only threatened or intended when the act threatened or intended, must necessarily, if performed, disturb the easement.

Where there has been an obstruction of an easement to light and air, the question, whether the relief should be by way of Injunction or damages, is one of no little difficulty.¹ In an early case in the Calcutta High Court,² the rule was stated to be that, if it be satisfactorily shown that the building when erected will materially lessen the enjoyment of light and air to which the plaintiff lays claim by right, then the Court will interfere by Injunction.

The decisions of the English Courts (bearing upon the principles regulating the grant of an Injunction) down to the years 1871, 1888, and 1894, respectively, have been reviewed in the Bombay High Court by Sargent, C. J., in three judgments from which the following excerpts are taken. In the first of those cases, decided prior to the passing of the Specific Relief Act,³ he said :—

“ Now the Court of Chancery in England has, in the course of the last seven and eight years, had frequently to consider the question of obstruction to light and air, and the principles upon which the Court will interfere by

¹ *Kadambhai v. Rahimbhai*, 1. L. R., 13 Bom., 676 (1889).

² *Ratanji H. Pottlewalla v. Edalji H. Bottlewalla*, 8 Bom. H. C. R.,

³ *Barrow v. Archer*, Coryton, 10, 131, 186—189 (1871).
11 (1864).

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Injunction either to prevent, or prohibit the continuance of, the alleged obstruction. The perusal of those cases beyond question, leads to one conclusion—a conclusion referred to by the present Lord Chancellor when sitting as Vice-Chancellor Page Wood in the case of *Dent v. Auction Mart Co.*,¹ namely, that there are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an Injunction could be maintained or an action upon the case, which, however, might be maintained in many cases which could not support an Injunction. When, however, we pass to the application of that proposition to the varying circumstances of alleged obstructions, we find that the learned judges, be they Vice-Chancellors or Chancellors, have differed materially both in their mode of stating the principles upon which that doctrine is to be applied and still more, perhaps, in the application of the doctrine to the actual circumstances before them. Now the earliest of the recent cases in which the matter has been fully considered is that of *Jackson v. The Duke of Newcastle*,² before Lord Westbury. His Lordship, after referring to the judgment of Lord Eldon in *The Attorney-General v. Nichol*,³ says: 'The foundation of the jurisdiction appears to be, that injury to property which renders it in a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The Court considers that injury of this nature does not admit of being measured and redressed by damages.' In *Johnson v. Wyatt*⁴

¹ *Dent v. Auction Mart Co.*, L. R., 2 Eq., 238 (1866).

² *Jackson v. The Duke of Newcastle*, 33 L. J., Ch., 698. It has been stated that the principle of law in this case appears to have been widened by recent decisions;

Jamnadas Shankarlal v. Atmaram Harjivan, I. L. R., 2 Bom., 136, 137 (1877).

³ *The Attorney-General v. Nichol*, 16 Ves., 342.

⁴ *Johnson v. Wyatt*, 23 L. J., Ch., 394.

before the Lords Justices, the Lord Justice Turner says: I think that at all events a plaintiff coming to this Court for its interference in a case of this nature is bound to show that the obstruction is such as will render the house occupied by him, if not of less value, less fit, or at least substantially less comfortable, for the purposes of occupation.' In *Dent v. Auction Mart Co.*,¹ the present Lord Chancellor, then Vice-Chancellor, Wood, having, as he says, considered the question in every possible way, arrived at the conclusion that, when substantial damages would be given at law, as distinguished from some small sum—£5. £10, or £15—the Court would interpose by Injunction. However, he admits that he feels some difficulty with reference to recent authorities, and that the decision of the Lords Justices in *Robson v. Whittingham*² is scarcely reconcilable with such a principle. In *Martin v. Headon*,³ Vice-Chancellor Kindersley says, that whenever it is shown that the comfort or enjoyment of a man or of his family in the occupation of his house is seriously interfered with, there is sufficient ground for the interference of the Court: and lastly, in *Staight v. Burn*,⁴ Lord Justice Giffard says: 'I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, this Court will interfere by Injunction.'

The statements of the learned judges in the two last cases, taken together, seem to me to be as lucid and complete an exposition of the principle on which the Court interferes in cases of this nature as the subject admits of.

¹ *Dent v. Auction Mart Co.*, L. 425 (1865).
R., 2 Eq., 238 (1866).

² *Staight v. Burn*, L. R., 5 Ch.

³ L. R., 1 Ch. App., 442 (1866).

App., 163 (1866).

⁴ *Martin v. Headon*, L. R., 2 Eq.,

It is to be remarked that in both those cases the learned Judges said they would have granted a mandatory Injunction, had it been asked for in the first case and had the question been before the Court at the hearing in the latter.

In *Dent v. Auction Mart Co.*,¹ an Injunction, both preventive and mandatory, was granted; and in *Johnson v. Wyatt*² the question before the Court involved the right to an Injunction of either description. It is clear, I think, therefore, that the learned Judges had the remedy by mandatory Injunction in contemplation, when they laid down the principle upon which the Court interferes. This is clearly so with respect to Lord Westbury from his Lordship's remarks in *Isenberg v. East India House Estate Company*.³ He says: 'The remedy given by the Common Law for a grievance of this description is an action for damages—that action is liable to be resorted to so long as the cause of damage continues. Upon that ground, and by reason also of the damage in many cases not admitting of being estimated in money, this Court has assumed jurisdiction. Now this jurisdiction, so far as it partakes of the nature of a preventive remedy—that is, prohibition of further damage, or an intended damage—is a jurisdiction that may be exercised without difficulty and rests upon the clearest principles. But there has been superadded to that the power of the Court to grant what has been denominated a *mandatory Injunction*, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made. The exercise of that power is one that must be attended with the greatest possible caution. I

¹ L. R., 2 Eq., 238 (1866).

² 33 L. J., Ch., 394 (1863).

³ 33 L. J., Ch., 392 (1863). See also as to mandatory Injunctions. *post*.

think, without intending to lay down any rule, that it is confined to cases where the injury done to the plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum that is, according to his Lordship's remarks in *Jackson v. Duke of Newcastle*,¹ when the interference with the light and air renders it, in a material degree, unsuitable for the purposes to which it is applied.'

In *Durell v. Prichard*,² Lord Justice Turner says: 'The authorities upon this subject lead, I think, to these conclusions, *that every case of this nature must depend upon its own circumstances*, and that this Court will not interfere by way of mandatory Injunction, except in cases in which extreme, or, at all events, very serious, damages will ensue from its interference being withheld.' The language used by Lord Westbury and Lord Justice Turner is undoubtedly somewhat stronger than that employed by the learned Judges in the more recent decisions in 1866, of *Dent v. Auction Mart Co.*,³ *Martin v. Headon*,⁴ and *Staigh v. Burn*,⁵ and shows, doubtless, that the tendency of the *decisions is towards a less sparing exercise of the jurisdiction than formerly prevailed*, and that, too, on the ground that the interference with *light and air* is not merely a nuisance, but an interference with that which, as Vice-Chancellor Kindersley says in *Martin v. Headon*,⁶ is, as a matter of principle, just as much part of the property of a man as his land or his house, and just as much entitled to protection as any other property.'

¹ 33 L. J., Ch., 698 (1863).

² L. R., 1 Ch. App., 244 (1865).

³ L. R., 2 Eq., 239 (1866).

⁴ L. R., 2 Eq., 425 (1865).

⁵ L. R., 5 Ch. App., 163 (1869).

⁶ L. R., 2 Eq., 425 (1865).

⁷ *Ratanji H. Bottlewalla v. Edalji H. Bottlewalla*, 8 Bom. H. C. R., O. C. J., 186—189 (1871), per Sargent, C.J.

The same learned Judge again¹ in 1888, subsequent to the date of the passing of the Specific Relief Act, reviewed the English decisions to date, saying as follows:—

“The power of the Courts of India to grant a perpetual Injunction is determined by the Specific Relief Act, I of 1877, section 54, which provides that the Court may grant such an Injunction ‘when the defendant invades, or threatens to invade, the plaintiff’s right to, or enjoyment of, property;’ and ‘where the invasion is such that pecuniary compensation would not afford adequate relief.’ It is to be remarked that this limitation of the power of granting an Injunction is identical with the conditions upon which the Court of Equity in England has always asserted the jurisdiction of granting preventive relief in cases of this nature. In *Attorney-General v. Nichol*,² Lord Eldon says, ‘that the foundation of the jurisdiction appears to be that injury to property which renders it in a material degree unsuitable for the purposes to which it is now applied, or lessens considerably the enjoyment which the owner now has of it. The Court considered that injury of this nature does not admit of being measured and redressed by damages.’ In *Staight v. Burn*,³ Lord Justice Giffard says: ‘I take the course of this Court to be, that when there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, the Court will interfere by Injunction.’ By Lord Cairns’ Act (21 and 22 Vic., c. 27), the Court of Chancery is empowered, if it thinks fit, to award

¹ *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 259—262 (1888); followed in *Sultan Nawaz Jung v. Rustomji Nanabhai*, I. L. R., 20 Bom., 704 (1896). In

this case no Injunction was given, but the plaintiff was held entitled to substantial damages.

² 16 Ves. Jun. at p. 342 (1809).

³ 5 Ch. App., 163, at p. 167 (1869).

Dhunjibhoy Cowasji Umrigar v. Lisboa. 1888

damages instead of granting an Injunction in cases falling within its jurisdiction, and since that Act has had to exercise the same discretionary power when the question has arisen whether damages or preventive relief should be granted. The particular effect of that Act does not appear to have received much consideration, until the entire question of the right to ancient lights and the appropriate relief in cases of obstruction was examined by Sir G. Jessel in *Aynsley v. Glover*.¹ The full discussion it then received makes it unnecessary to refer to earlier authorities. The Master of the Rolls in that case, after discussing the earlier decisions, which doubtless reveal a great variety of opinions, expresses his own view to be 'that, wherever an action can be maintained at law and really substantial damages, or perhaps, I should say, considerable damages, can be recovered at law, there the Injunction ought to follow in equity, generally, not universally.' He then refers to Lord Cairns' Act, and points out that the Act gives a new power to the Court, purely discretionary, to substitute damages in cases in which, before the passing of the Act, this Court would have granted an Injunction expressing an opinion that it is 'a reasonable discretion and *must depend upon the special circumstances of each case* whether it ought to be exercised'; and as an illustration of its application, he refers with approval to *Curriers' Company v. Corbett*² as showing that where the defendant's building has been already erected, the Court will take into consideration the fact of the injury to the plaintiff being of a slight

¹ L. R., 18 Eq., 456 at pp. 553, 554 and 555 (1874). 'In our opinion the rule of law in such cases (light and air) was correctly laid down by Sir George Jessel in *Aynsley v. Glover*, and by the late Mr.

Justice Pearson in *Holland v. Worley*, per Edge, C.J., and Knox, J., in *Yaro v. Sana-ullah*, I. L. R., 19 All., 259, 260 (1897).

² 2 Dr. & Sm., 355 (1865).

nature (although sufficient to sustain an Injunction) as contrasted with the serious damage to the defendant.

The subsequent decisions by the Master of the Rolls, *Smith v. Smith*,¹ and *Krehl v. Burrell*,² afford further, illustrations of the principle on which the discretion vested in the Court of Equity of awarding damages in lieu of an Injunction should be exercised. In *Holland v. Worley*,³ Mr. Justice Pearson, after referring to the above decisions by Sir G. Jessel, laid down the rule which he said he thought would be in accordance with the view of the Master of the Rolls, that in those cases where the injury would not be so serious, where the property might still remain the plaintiff's and be as substantially useful to him as it was before, the Court may, if it thinks fit, exercise the discretion given it by the Act, and in that case, after pointing out that the property would not be useless for the purpose for which it was employed, he held that, "looking at the nature of the property, and considering its situation in the heart of a great city like London," he would not be wrong in exercising his discretion by giving the plaintiff damages. This case has been referred to in terms of implied disapproval by Bacon, V. C., in *Greenwood v. Hornsey*,⁴ and it may be that Mr. Justice Pearson's ruling, which undoubtedly modified the generally received practice of the Court of Equity, may not be followed in England.

¹ L. R., 20 Eq., 500, at p. 505 (1875).

² L. R., 7 Ch. Div., 551, at p. 554 (1877).

³ L. R., 26 Ch. Div., 585, at p. 587 (1884); this case was approved in *Yaro v. Sana-ullah*, I. L. R., 19 All., 259, 260 (1897), v. ante, p. 442, Note 1.

⁴ L. R., 33 Ch. Div., 471, at p. 476 (1886). In *National Telephone Company v. Baker*, L. R. (1893), 2 Ch. 196, Kekewich, J., referring to *Holland v. Worley*, said "that case has not commanded the approbation of the profession." See also *Martin v. Price*, L. R. (1894), 1 Ch., 276, 280.

The question, however, whether damages are a sufficient compensation, does not, we think, present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England. This latter Court, in awarding damages under Lord Cairns' Act, exercises a discretionary power in departing from the specific relief, which it had hitherto exclusively afforded; and could scarcely be expected to take so broad a view of the subject as the Courts of this country, whose 'duty' it is under the Specific Relief Act not to grant an Injunction where damages offered adequate compensation. The result has been that this Court has in several cases adopted the view taken by Pearson, J., as being one which, if applied with caution, is suited to the circumstances of this city, which from its nature can in most parts of it only extend itself vertically upwards; and we think, therefore, that it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and *with due regard to the special circumstances of each case.*"¹

Again, in a still later case² decided in 1894, the same learned Judge again reviewed the English decisions and their bearing upon the provisions of the Specific Relief Act as follows:—

"At this stage, it will be convenient, I think, to consider the authorities bearing on this class of questions. The English cases were discussed at length in *Dhunjibhoy*

Ghanasham
Nilkant
Nadkarni v.
Moroba Ram-
chandra Pai.

¹ *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 259—262 (1888), per Sargent, C.J. The rule in *Holland v. Worley* was also followed in *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 674, 677 (1889), and the case was approved in *Yaro v. Sana-ullah*, I. L. R., 19 All., 259,

260 (1897), v. ante, p. 442.

² *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474, 483, 484, 487—489 (1894); followed in *Sultan Nawas Jung v. Rustomji Nanabhoy*, I. L. R., 20 Bom., 704 (1896).

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Cowasji v. Lisboa,¹ and the conclusion arrived at is that the view taken by Pearson, J. (in *Holland v. Worley*² when discussing Lord Cairns' Act), 'if applied with caution, is suited to the circumstances of this city, which, from its nature, can in most parts of it only extend itself vertically upwards;' and, we think, therefore, that it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and with due regard to the special circumstances of each case. Mr. Justice Pearson, in his judgment in the above case (see page 587), after referring to *Smith v. Smith*³ where Jessel, M. R., discusses the application of the above Act, which enabled the Court of Chancery to give damages in a case in which an Injunction would otherwise have been given, draws the conclusion that, 'where the property may still remain the plaintiff's (i.e., as distinguished from the case where the only fair compensation would virtually be to make the plaintiff sell his property to the defendant) and be substantially useful to him as it was before,' the injury is one which can in that case be properly compensated by money. This view of Lord Cairns' Act is spoken of by Kekewich, J., in *Dicker v. Popham Radford & Co.*,⁴ as not laying down any new rule, and as amounting to no more than that (as had already been said in several cases) where there is a discretion exerciseable, the Court is bound to look at all the circumstances of the case. In this country the jurisdiction of the Civil Court in granting relief by Injunction is given by the Specific Relief Act (I of 1877). Section 54 of the Act provides that it may be granted in certain cases, one of which

¹ I. L. R., 13 Bom., 262 (1888).

² 63 Law Times Reports at p. 381

³ L. R., 26 Ch. D., 578 (1884). (1890).

⁴ L. R., 20 Eq., 500 (1875).

is where pecuniary compensation would not afford adequate relief. No doubt the jurisdiction of the Court of Chancery in questions of relief by Injunction, etc., as stated by Lord Eldon in *Attorney-General v. Nichol*¹ and explained by Vice-Chancellor Wood in *Dent v. Auction Mart Co.*,² and by Sir G. Jessel in *Aynsley v. Glover*³ is treated as existing where substantial damages would be given by a Court of law. But this Court has the jurisdiction, both of a Court of law and equity, and in the exercise of the discretion will regard the materiality of the injury in the sense in which that expression was used by Sir G. Jessel in *Smith v. Smith*,⁴ and which, as pointed out by Fry, J., in *National Provincial Plate Insurance Company v. Prudential Insurance Company*,⁵ means something more than is sufficient to give the Court jurisdiction to grant an Injunction, and may depend on all the circumstances of the case.⁶

When the Specific Relief Act was passed in 1877, the law in England on the subject of Injunctions—I speak more particularly in reference to Injunctions restraining the obstruction of ancient lights—was this: A plaintiff who had sustained, or who was likely to sustain, material injury entitling him to substantial damages by reason of the obstruction or proposed obstruction of his ancient lights by the defendant's buildings, was, in the absence of special circumstances, entitled to an Injunction, according to the established principles of Courts of Equity: *Martin v. Price*.⁷ Lord Cairns' Act had, however, conferred upon Courts of Equity the power to award damages to

¹ 16 Ves. at p. 342 (1809).

² L. R., 2 Eq., 238 (1866).

³ L. R., 18 Eq., 544 (1874).

⁴ L. R., 20 Eq., 500 (1875).

⁵ L. R., 6 Ch. D., 768 (1877).

⁶ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 483, 484 (1894).

⁷ L. R. (1894), 1 Ch., 276. See as to this case, *post*.

the party injured, either in addition to, or in substitution for, an Injunction, in cases in which those Courts had jurisdiction to entertain an application for an Injunction. That power was a discretionary one, but the law as to the circumstances under which the Courts would exercise that discretion was in an unsettled state, and no clear rules for the guidance of the Court had been established by the decisions: *Holland v. Worley*.¹ Even now it is an open question whether damages in lieu of an Injunction can be awarded by way of compensation for an injury not yet committed, but only threatened and intended: *Martin v. Price*.² Section 33 of the Easements Act, 1882, lays down for us the law as to the case in which damages or compensation can be awarded, and sets that question at rest. The Specific Relief Act (I of 1877), section 54, enacts that when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court may grant a perpetual Injunction in the following case:—(c) When the invasion is such that pecuniary compensation would not afford adequate relief. (I omit clauses (a), (b), (d) and (e) as not specially applicable to the present circumstances.) The Court has under that section jurisdiction to grant an Injunction only in those cases where pecuniary compensation would not afford adequate relief. The expression 'adequate relief' is not defined, but it is probably used in the sense in which Kindersley, V. C., uses it in *Wood v. Sutcliffe*³ as meaning such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before. If that be the correct meaning of the phrase,

¹ 26 Ch. D., 578, at p. 587 (1884).

² 21 L. J., Ch. at p. 255 (1861).

³ L. R. (1894), 1 Ch., 276.

it is, I think, difficult to predicate of any material obstruction to ancient light that pecuniary compensation for it would in effect place the plaintiff in the same position as before, and, more particularly so, where the light is obstructed in a house in which a man is himself residing.

It does not, however, follow that in such cases a plaintiff is entitled as of right to an Injunction. Under the Specific Relief Act, the Courts are given a discretion to grant or withhold an Injunction, as in England they have a discretionary power to award damages in lieu of an Injunction. In this view of the law, the Court has to consider in each case, not merely whether the plaintiff's legal right has been infringed, or even materially infringed, *but also whether under all the circumstances of the case he ought to be granted an Injunction as the proper and appropriate remedy for such infringement.*

Two principles are, I think, deducible from the English cases, which may be deemed binding upon our Courts : (1) That Courts ought not to interfere by way of Injunction when obstruction of light is very slight and where the injury sustained is trifling, except in rare and exceptional cases : *Dent v. Auction Mart Co.* ;¹ *Herz v. Union Bank of London* ;² Goddard on Easements, p. 438 ; and (2) that where the defendant is doing an act which will render the plaintiff's property absolutely useless to him, unless it is stopped, in such a case, inasmuch as the only compensation which could be given to the plaintiff, would be to compel the defendant to purchase his property out and out ; the Court ' will not, in the exercise of its discretion, compel the plaintiff to sell his property to the defendant ' by refusing to grant him an Injunction

¹ L. R., 2 Eq., 238 (1866).

² 2 Giff., p. 686 (1859).

and awarding him damages on that basis (see *Holland v. Worley*).¹ Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a *discretion* to withhold or grant an Injunction, *having regard to all the circumstances of the particular case* before them, including the fact that the premises are situated in a city like this, where land suitable for building is limited and very valuable, and where property-owners should, so far as is possible, consistently, with the existing rights of their neighbours, be allowed to utilize it to the utmost extent.

Mr. Scott, for the respondent, contended that the present was a case for an Injunction, because it fulfilled the conditions of section 54, sub-clause (b), inasmuch as there was no standard for ascertaining the actual damage caused or likely to be caused by the invasion. I think, however, that this sub-clause has rather application to such cases as are referred in the illustrations (h) and (i) to the section, where there is no possible standard with reference to which the contemplated injury can be compensated, than to a case of injury to property like a house occupied by its owner in danger of being deprived of its ancient light. Juries have never experienced any insuperable difficulty in cases of the latter kind. In earlier times, before the passing of Lord Cairns' Act, Courts of Common Law, rather than Courts of Chancery, were resorted to in cases of obstruction of ancient lights: Goddard (3rd Ed.), p. 423—the aid of the Court of Chancery

¹ L. R., 26 Ch. D., 578 (1884).

being invoked in later times on account of damages being an inadequate remedy, or inappropriate to the circumstances of the case.”¹

In a recent decision of the Madras High Court² it was said :—

“ Assuming that the plaintiffs are entitled to compensation, the Court may grant a perpetual Injunction in respect of an invasion of a right to, or enjoyment of, property, when the invasion is such that pecuniary compensation would not afford adequate relief.

This test is in practice a difficult one to apply. On the one hand, it may be said, that there can be no disturbance of an easement on which a pecuniary value cannot be placed, because it is always possible to ascertain the difference in the selling value of the property brought about by the obstruction of which complaint is made. On the other hand, if the phrase means ‘such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before’, it would, as observed by Farran, J., be difficult to predicate of any material obstruction to ancient lights that pecuniary compensation could bring about that result: *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*.³ Only in the case in which the money might be spent in the structural alteration or re-arrangement of the premises could that result possibly be produced. The question really comes to be one of degree. At the one end of the scale is the case in which the plaintiff's building will be rendered useless, unless the proposed building

¹ *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 487—489, per Sargent, C.J.

Mad., 251, 253 (1899), per Shephard, Offg. C. J.

² *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 474 at p. 488 (1894).

³ *Boyeon v. Deane*, I. L. R., 22

is stopped. At the other is the case in which diminution of light is comparatively small though still substantial. If I may take *Martin v. Price*¹ as a statement of the English law on the subject, I think it must be admitted that it is *different from the law we have to administer here under the Specific Relief Act* and the Easements Acts: see *Dhunjibhoy Cowasji Umrigar v. Lisboa*² and *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*.³ In *Martin v. Price*,⁴ the evidence was to this effect: The plaintiff's house standing on ground higher than the level of the houses opposite, faced a street from 35 to 37 feet wide: opposite was a house having an elevation of 37 feet and a frontage of 77 feet. For that house defendant proposed to substitute one having a frontage of 27 feet and a height of 62 feet. Kekewich, J., having regard, among other things, to the term for which plaintiff held, gave judgment for £120 damages and refused an Injunction. The Court of Appeal held that as the plaintiff had sustained material injury he was entitled to an Injunction *in the absence of proof of circumstances depriving him of the primâ facie right*. No reference was made to the test prescribed by the Specific Relief Act. *According to that decision, the rule of English law is the converse of the rule prevailing here. There the right to an Injunction is the primâ facie right: here an Injunction is not to be given when the remedy in damages is considered adequate.* For a statement of the law in terms more consonant with that which we have to administer, I would refer to Lord Westbury's judgment in *Jackson v. Duke of Newcastle*.⁵ This case, decided

¹ (1894), 1 Ch., 276.

² I. L. R., 13 Bom., 252 (1888).

³ I. L. R., 18 Bom., 474 (1894).

⁴ (1894), 1 Ch., 276.

⁵ 3 DeG. J. & S., 275, at p. 284;

v. ante.

in 1864, has with reference to another point, been disapproved in later cases. With regard to that other point the Indian Legislature seems to have followed it nevertheless, and it may well have been present to their minds when the Specific Relief Act was being framed : see Michell's Law of Easements, page 234. ¹

According to the decisions, therefore, of the Bombay and Madras High Courts an Injunction might in many cases be refused where, according to the present English case law, it would be granted.² The general principles upon which these Courts would or would not grant an Injunction are sufficiently indicated in the judgments already cited. Apart, however, from the general provisions of the Specific Relief Act, of which these cases are an interpretation no fixed rule can be rigidly laid down upon the question whether an Injunction should or should not issue. Each case must be decided according to its own circumstances. And though the Courts will take care not to unnecessarily impose the burden of an Injunction upon the defendant, they will see that a right of property, which may be said to be of peculiar value in this country, is properly protected and secured. Relief by mere damages will often amount to a forced sale of the plaintiff's easement. An Injunction can be granted wherever substantial damages could be awarded under the English law. It is not, however, easy to reconcile all the English cases

¹ *Boyson v. Deane*, I. L. R., 22 Mad., 253—255 (1899), per Shephard, Offg. C. J.

² Michell's Law of Easements, 235; In *Sultan Nawaz Jung v. Rustomji Nanabhoy*, I. L. R., 20 Bom., 704 (1896), the Court observed, that to Courts subject to the Specific Relief Act the English decisions

cited, have no application. (*Martin v. Price*, supra; *Shelfer v. City of London Electric Lighting Co.* (ante) and other English cases were cited) : *sed quære*, the provisions of the Specific Relief Act being founded upon and being the embodiment with some exceptions, of the English case law.

on the question of Injunction as opposed to damages ; the question is one of degree, and the whole of the circumstances are seldom or never stated.¹

Any act by which the control of light and air are taken out of the hands of the persons entitled to them, or by which the access of light and air to the window of a dwelling-house is interfered with, is *prima facie* an injury of a serious character.² However doubtful it may be in some cases whether damages or an Injunction should be granted, it is clear that a wilful and confident assumption of mastery over another man's property, or the use of it in reliance on mere money, will not be tolerated.³ So where the defendant enclosed the plaintiff's window within his own house and forced on him the alternative either of closing the window or taking such air through it as the defendant might choose to supply him, it was held that the defendant having thus, without leave or license, taken possession of the plaintiff's window as completely as if he had blocked it up altogether, there was no precedent warranting the substitution of damages for an Injunction in such a case against the will of the party injured.⁴ And when it was proved that a wall intended to be built would so shut out the light and air as to render the room completely dark and unfit for use, the Court granted an Injunction;⁵ as also when there was a complete darkening of some of the plaintiff's principal rooms.⁶ The Allahabad

¹ *Nandkishor Balgovan v. Bhagubhai Pranvalbhdas*, I. L. R., 8 Bom., 97, 98 (1883).

² *Nandkishor Balgovan v. Bhagubhai Pranvalbhdas*, I. L. R., 8 Bom., 95 (1883).

³ *Nandkishor Balgovan v. Bhagubhai Pranvalbhdas*, I. L. R., 8 Bom., 95, 97, 98 (1883), *per West, J.*

⁴ *Ib.*

⁵ *Kadarbhai v. Rahimbhai*, I. L. R., 13 Bom., 674 (1889).

⁶ *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133, 136 (1877); and as to effect of covenants in the lease, see *R. H. Bottlevalla v. E. H. Bottlevalla*, 8 Bom. H. C. R., O. C., 181, 194; *Leech v. Schweder*, I. R., 9 Ch. App., 463.

High Court in a recent case in which the Bombay decisions cited were relied upon observed that the rule of law was correctly laid down in the English decisions already referred to of *Aynsley v. Glover* and *Holland v. Worley*, and that in its opinion it was not intended by section 54 of the Specific Relief Act that a man should not have an Injunction granted to him, unless his property would otherwise be practically destroyed, if the Injunction were not granted. Where there is substantial and wrongful injury to a plaintiff's right, he is entitled to an Injunction.¹

There must have been no delay or acquiescence.² It is, however, for the defendant to show that the right has been lost by acquiescence.³

In estimating the damage the Court, it has been said, cannot consider whether the place in which the building is, is in the country, or in a populous city. So, where it was said that the diminution of light would not seriously or materially affect the enjoyment of the house as a dwelling-house, having regard to what people can reasonably expect in a crowded city like Bombay, it was held that this was a matter which the Court could not consider, and that the only question which the Court has to decide is whether the enjoyment has been seriously interfered with by the obstruction of the light and air.⁴ The Court will

¹ *Yaro v. Sana-ullah*, I. L. R., 19 All., 259 (1897).

² v. Ch. II, ante, *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 137 (1869); Acquiescence of course imports full knowledge: *Gopalnarain Mozoomdar v. Muddomutty Gooptee*, 14 B. L. R., 35 (1874).

³ *Nandkishor Balgovan v. Bhagubhai Pranvalabhdas*, I. L. R., 8 Bom., 95 (1883).

⁴ *Ratanji Hormasji Bottlewalla*

v. *Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181, 192 (1871); citing *Yates v. Jack*, 1 Ch., 295; *Dent v. Auction Mart Co.*, 2 Eq., 238; *Martin v. Headon*, ib., 425; see, however, *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. H. C. R., O. C. J., 148, 154 (1863), in which it was said *per Sausse, C. J.*:—"We think that some modification of the ordinary rights of easement may be necessary and reasonable in a town like Bom-

look not merely to the use to which rooms in a dwelling-house from which light is obstructed are actually put at the time of the obstruction, but also to the use to which they may be put for all reasonable purposes of occupation. That purpose will vary from time to time according to the exigencies of the family; but the mere circumstance, for example, that a room is used as a lumber-room or godown at the date of suit cannot affect the question of enjoyment, which is the right to its enjoyment for all reasonable purposes to which it may be put as a room in a dwelling-house.¹ But, although a plaintiff's light may have been sensibly diminished by the erection of the defendant's building, an Injunction will not be granted unless there has been such a large, material and substantial damage as to require interference by that form of relief, or the plaintiff's rooms have been rendered unfit for the purposes for which they might reasonably be *expected* to be used.² So rooms used for residential purposes at the date of suit, may be

bay. The great difficulty consists in determining what the extent of that modification should be; " and at p. 156—" It is not the province of the Court to lay down *a priori* any rule for the modification of this right of easement which may arise out of the circumstance of its having been enjoyed in a densely built and populated town. The person who has allowed another to obtain such a right over his property will infringe that right at his peril; " and in *Ghanasham Nilkant Nadkarni v. Moroba Ramchandra Pai*, I. L. R., 18 Bom., 489 (1894), *per* Farran, J., it was held that the Court in considering whether it will grant or withhold an Injunction may take into consideration the fact that the premises are situated in a city like

Bombay, where land suitable for building is limited and very valuable and where property-owners should, so far as is possible consistently with the existing rights of their neighbours, be allowed to utilize it to the utmost extent. See also *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 262 (1888).

¹ *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., O. C. J., 181, 192, 193 (1871).

² *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 474, 485, 490 (1894); following *Aynsley v. Glover*, L. R., 18 Eq., 544; and see *Dhunjibhoy Cowasji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 264 (1888).

such and so placed that it cannot be reasonably expected (though the mode of occupying may be altered and should be taken into account,¹) that they will ever be used for any other purpose.² The Court may, however, in particular cases have to consider the damage likely to accrue to the plaintiff within some reasonable time by reason of a probable change in the nature of the occupation of his premises.³

A person who is in the present enjoyment of an access of light to his premises for a special or extraordinary purpose, such as taking photographic portraits, may obtain an Injunction against interference with that access of light even though he may not have been in the enjoyment of it for that special or extraordinary purpose for the full statutory period of twenty years.⁴

Where it was contended that the question for the Court to consider was exclusively whether in consequence of the defendant's building there would be a material diminution of the light and air through a particular window, without taking into consideration the light and air afforded to the room by the other windows in it, it was held that on the contrary, the Courts have always recognised as the important point for inquiry, whether the comfort of the plaintiff in the use of the room has been materially diminished, and in coming to a conclusion as to that, it was impossible to disregard the fact that there were

¹ *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 474, 490 (1894); citing *Moore v. Hall*, 3 Q. B. D., 178; *Dicker v. Popham Radford & Co.*, 63 L. T., 379; and see *Dhunibhoy Cowaji Umrigar v. Lisboa*, I. L. R., 13 Bom., 252, 255 (1888) [further possible use must be considered by

the Court].

² *Ib.*, and see *Dhunibhoy Cowaji Umrigar v. Lisboa*, I. L. R., 13 Bom., 264.

³ *Ib.*; citing *Dicker v. Popham Radford & Co.*, *supra*.

⁴ *La arus v. Artistic Photographic Company*, L. R. (1897), 2 Ch., 214.

other windows in the room through which light and air were obtained.¹

It has been held that where there is an express covenant, the Court will, in the absence of special circumstances, compel the defendant to perform his covenant without looking minutely into the nature or extent of the interference. Where the defendant is materially obstructing the light and air to which the plaintiff is entitled, the Court will not go into the question whether or no it seriously affects his enjoyment of the house.² But in a subsequent case of breach of contract it was held that the Court should, before issuing a mandatory Injunction, be satisfied that the obstruction so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of the agreement cannot adequately be compensated by damages.³

The 45° rule is not a rule of law, nor a presumption of act, until it is shown to be applicable;⁴ but though not a positive rule of law, it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory.⁵ Expert evidence is usually given.⁶ A photograph may be

¹ *Dhunjibhoy Cowasji Umrigar v. Lisboa*, 1. L. R., 13 Bom., 262, 263 (1888).

² *Ratanji Hormasji Bottlewalla v. Edalji Hormasji Bottlewalla*, 8 Bom. H. C. R., 181, 194, 195 (1871); but as to express covenants, see *ante*.

³ *Ranchhod Jamnadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873).

⁴ *Clement v. Melony*, Suit 271 of 1883 cited in *Delhi and London Bank, Ltd. v. Hem Lall Dutt*, 1. L. R., 14 Cal., 849.

⁵ *The Delhi and London Bank, Ltd. v. Hem Lall Dutt*, 1. L. R., 14 Cal.,

858 (1887). See Michell's *Law of Easements*, 240; and *Parker v. First Avenue Hotel Company*, 24 Ch. D., 288, 289.

⁶ As to the value of such evidence see *Pranjiwandas Harjiwandas v. Mayaram Samaldas*, 1 Bom. H. C. R., O. C. J., 155 (1882); *Ratanji H. Bottlewalla v. Edalji H. Bottlewalla*, 8 Bom. H. C. R., O. C. J., 192 (1871); *Lackersteen v. Tarucknath Paramanick, Cor.*, 92 (1864); as to experiments see *Leech v. Schwedder*, L. R., 9 Ch. App., 463, 471; *Lackersteen v. Tarucknath Paramanick, Cor.*, 91 (1864).

put in evidence to show the deviation of the light,¹ and the Judge may himself personally inspect the premises.²

The Court will see that the plaintiff has such possession as will enable him to maintain the action, and, in case of doubt, will direct other persons to be made parties to the suit. When a suit was brought by a person who was only trustee for another, and the *cestui que trust* was in possession of the premises, the Court directed that the latter should be made a party.³ If the obstruction is of a temporary nature, the person in occupation alone can sue for damages or an Injunction; but if the obstruction is of a permanent character, lessening the value of the reversion or remainder, or affecting evidence of the easement, the reversioner or remainderman may sue.⁴ When a motion for an Injunction is refused it will be without prejudice to an action for damages.⁵ A plaintiff cannot be called upon to accept any other form of relief than damages or an Injunction.⁶

When the Lower Court had by its decree granted an Injunction, but the Appeal Court varied that decree, and refused an Injunction, but ordered the defendant to pay the plaintiff Rs. 500 as damages, it was argued for the defendant (appellant), on the question of costs, that he should be given his costs of appeal, as he had succeeded in setting aside the Injunction granted by the Lower Court, and should also get his costs of hearing in the Lower Court,

¹ *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, 1. L. R., 18 Bom., 478 (1894).

² *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, 1. L. R., 18 Bom., 478, 482, 493 (1894); *Bhuban Mohun Bann v. J. S. Elliott*, 6 B. L. R., 90 (1870).

³ *Lackersteen v. Tarucknath Paramanick*, Coryton, 91 (1864).

⁴ *Kino v. Rudkin*, 1. R., 6 Ch. D., 160; *Cooper v. Crabtree*, 1. R., 20 Ch. D., 589; *Wilson v. Townsend*, 1 Dr. & S., 324; *Metropolitan Association v. Petch*, 5 C. B., N. S., 504.

⁵ *Barrow v. Archer*, Coryton, 9, 11 (1864).

⁶ *Kadarbhai v. Rahimbhai*, 1. L. R., 13 Bom., 676 (1889).

as the whole contest there had been as to the right to an Injunction, which in appeal had been refused. The defendant had paid Rs. 200 into Court, when he filed his written statement, and would have paid more, if he could have obtained any indication from the plaintiff of the amount that would satisfy him. Nothing, however, would satisfy the plaintiff but an Injunction, and he had failed to get it. It was, however, *held* that, under the circumstances, the plaintiff should have his costs of hearing in the Lower Court, and that each party should pay his costs of the appeal and of the proceedings on the rule for an Injunction before the trial. The ordinary rule should be observed, and the costs should follow the event. The event in this case was that the plaintiff had proved his case against the defendant, although he had not got the precise form of relief which he wanted. If a party substantially succeeds, he is entitled to his costs.¹

If an Injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the Injunction has been infringed, an attachment will issue, even though the defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the Injunction. The Court in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment as to the probable effect of the structure complained of.²

An application for attachment for breach of an Injunction should be made by motion on notice to the opposite party.³

¹ *Ghanasham Nilkant Nadkarni* *Mayaram Samaldas*, 1 Bom. H. C. R.,
v. *Moroba Ram Chandra Pai*, 1. L. 151, 156 (1883), v. *ante*.
R., 18 Bom., 477 (1894), v. *ante*. ² *Ib.*

³ *Pranjivandas Harjivandas* v.

An Injunction restraining the obstruction of light and air may be enforced against the deceased defendant's legal representative. In the undermentioned suit¹ the plaintiff obtained a decree against defendant, restraining the latter from obstructing the access of light and air to her windows. The plaintiff applied for execution, praying that the portion of the defendant's house which obstructed her windows should be pulled down. While this application was pending the defendant died and his son and heir (the appellant) was brought on the record. The Lower Courts directed that the decree should be executed as prayed for and directed the appellant (the son and heir of the deceased defendant) to pull down the obstructing portion of the house in question within a given time, and in case of his failing to do so, empowered an officer of the Court to have it pulled down. On second appeal to the High Court it was contended (1) that as the judgment-debtor had died after the commencement of the proceedings, a fresh application should have been made instead of continuing the *durkhast* issued against him against his son (the present appellant), and that no notice had been issued under section 248 of the Civil Procedure Code (Act XIV of 1882); (2) that the Lower Courts should have made their orders under section 260 of the Civil Procedure Code (Act XIV of 1882); and (3) that the original defendant having died, the Injunction could not be enforced against his son (the appellant) as an Injunction does not run with the land. *Held*, as to the first objection, that as it was not raised in the Lower Courts, it could not be entertained on second appeal. As to the second objection : *Held* that the order passed by the Lower Courts was wrong. Their order should have

¹ *Sakaral v. Bai Parbatibai*, 1. L. R., 26 Bom., 283 (1901).

been made under section 260 of the Code of Civil Procedure (Act XIV of 1882). The application for execution was not in proper form, but the High Court allowed it to be amended. As to the third objection: *Held* that having regard to the provisions of section 234 of the Civil Procedure Code, 1882, the Injunction ordered against the deceased defendant might be enforced against his son as his legal representative.

Easements relating to support may be of two kinds, (v) *Support*, either conferring rights to have support or conferring rights to take away support. Such easements are rights to have support additional to, or different from, the support to which a person has a natural right, such as the right of support to a building from land, to a building from another building, and the right to a greater degree of support to a surface stratum which has been altered by quarrying or otherwise than such stratum would have required in its natural state.¹ Under the Easements Act the removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.² Subject to the provisions of the Specific Relief Act an Injunction may be granted to restrain the disturbance of an easement of support (a) if the easement is actually disturbed when compensation for such disturbance might be recovered under Chapter IV of the Easements Act; (b) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.³ A plaintiff will be entitled to an Injunction, though no damage has been actually sustained up to the time of the institu-

Injunctions
against with-
drawal of
support.

¹ See *Michell's Easements*, 29, 30, and *passim sub voc.*, 'Support,' and *Kerr., Inj.*, pp. 220—235.

² *Easements Act*, s. 34.

³ *Ib.*, s. 35.

tion of the suit, if the facts proved shew that subsidence and damage would be the inevitable result of a continuance, threatened by the defendants, of the excavation.¹

The Easements Act only declared the existing law as to easements over water.² Easements in water are restrictions of those natural rights in water illustrations of which are given in section 7 of that Act.³ Those easements may exist as to the flow, use and consumption, pollution or the discharge of rain-water upon adjoining land. A right to surface water not flowing and not permanently collected in a pool, tank, or otherwise, and a right to underground water not passing in a defined channel cannot be acquired by prescription.⁴

(vi) Water.

Easements regarding the flow of water may exist with regard either to natural or artificial watercourses. A natural stream is a stream whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course. The right to an uninterrupted flow of water in artificial streams is an easement, and the right to an easement in the flow of water through an artificial watercourse is as valid against the Government as it is against a private owner of land.⁵ A proprietor of land on the bank of a river ought to be restrained from erecting a mound, which if completed, would in times of ordinary flood throw the waters of

¹ *Bindu Basini Chowdhurani v. Jahnnabi Chowdhurani*, I. L. R., 24 Cal., 260 (1896).

The principle of this decision which dealt with a natural right of support, applies equally to an easement of support.

² *Perumal v. Ramasami*, I. L. R., 11 Mad., 16 (1887). See generally as to nuisances relating to water.

Kerr, *Inj.*, 236—262. Hilliard, *Inj.* 623—641. High, *Inj.*, §§ 870—885. Beach, *Inj.*, Ch. XXXVII.

³ See Illustrations (f), (g), (h), (i), (j).

⁴ Easements Act, s. 17, cl. (c), (d).

⁵ *Ponnusami Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 6 (1860).

the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them.¹

As an easement is a limiting right or a right *in alieno solo* the relief awarded by Injunction or otherwise should certainly not be more extensive than what is necessary to its beneficial enjoyment.² The interference of the Court in cases of prospective injury very much depends upon the nature and extent of the apprehended mischief and upon the certainty or uncertainty of its arising or continuing. Where there is no case of prospective damage made out an Injunction will be refused.³ It must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial but a substantial injury in order to warrant relief by way of Injunction.⁴

Injunctions in respect of rights to water.

A plaintiff is bound to establish not merely an injury, actual or prospective caused by the act of the defendant, but an injury caused by the infraction of some legal right which the plaintiff possesses, or by the omission of something which the defendant was legally bound to do.⁵

But enjoyment or user cannot evidence or establish a right greater than the beneficial use made by a plaintiff of the water. Any exclusive right is to be measured by its enjoyment. So as soon as flowing water which is originally *publici juris* is appropriated by an individual his right is co-extensive with the beneficial use to which he appropriates it. And the circumstances under which an artificial course is created may give rights similar to

¹ *Venkatachalam v. Zemindar of Sivaganga*, I. L. R., 27 Mad., 409 (1904); dist. *Gopal Reddi v. Chenna Reddi*, I. L. R., 18 Mad., 158.

² *Perumal v. Ramasami*, I. L. R., 11 Mad., 19 (1887).

³ *Krishna Ayyan v. Venkatachella*

Mudali, 7 Mad. H. C. R., 71 (1871).

⁴ *Ponnusami Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 6, 24 (1869).

⁵ *Prankristo Roy v. Hvro Chunder Roy*, 10 W. R., 425 (1838).

those of a riparian proprietor.¹ Upon findings of fact a presumption may arise that the enjoyment had an origin which conferred a right.²

An Injunction will be granted where the injury is one of a constantly recurring kind and from the very nature of the easement, it would be impracticable to estimate an adequate compensation in pecuniary damages as a proper substitute for the relief by Injunction.³

The general rule is that a permanent Injunction is only granted first, when some established right has been invaded and, second, when damage has accrued or must necessarily accrue from the act or omission complained of.⁴

Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner of the dominant tenement to abandon the benefit before enjoyed and not merely to a temporary suspension of the enjoyment, or be evidenced by acts or words which had induced the owner of the servient tenement to incur expense in the reasonable belief that the enjoyment had been entirely relinquished.⁵

(vii) Way.

Ways are either public, that is highways, or private : and a claim may be made to use a road as a private individual and to use it as one of the public. The former claim is merely a private easement, the latter is one in favour of the public. In the first case a twenty years'

¹ *Krishna Ayyan v. Venkatachella Mudali*, 7 Mad. H. C. R., 70 (1872).

² *Madhub Das Bairagi v. Jogesh Chunder Sarbar*, 1. L. R., 30 Cal., 281 (1902).

³ *Krishna Ayyan v. Venkatachella Mudali*, 7 Mad. H. C. R., 71 (1871).

⁴ *Krishna Ayyan v. Venkatachella*

Mudali, 7 Mad. H. C. R., 71 (1872). As to injunctions of an indefinite nature, see *Kalu Khabir v. Jan Meah*, 1. L. R., 29 Cal., 100 (1901).

⁵ *Ponnusami Tevar v. The Collector of Madura*, 5 Mad. H. C. R., 6, 23 (1869).

enjoyment by the claimant must be proved, in the second no fixed period of enjoyment need be shown. It is sufficient if acts of user by the public are shown to have been acquiesced in by the owner or owners of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right to use the land as a public highway.¹ When a road has been dedicated for the use of the public, the owner of the soil, over which the road runs, is entitled to exercise all rights of ownership, so as not to interfere with the right of way, which exists in the public. When the owner of such soil, is responsible for keeping the road in order and in good repair, he is entitled to institute a suit for damages and injunction against the destroyer of any work of improvement done to the road without proving special damage.² Private rights of way may arise by grant, express or implied, or by prescription. If a right of way be acquired by grant, the extent of the easement must be determined by the words of the grant. If a right of way be acquired by prescription, the character and extent of the easement is fixed and determined by the use and enjoyment under which it has been gained, the right acquired being measured by the extent of the enjoyment which is proved. The purpose for which the way may be used is limited by the actual user which has taken place during the whole period necessary for the acquisition of the right.³ A right of way over land

¹ *Anderson v. Juggodumba Dabi*, 6 C. L. R., 282, 284 (1880). See *Ranchordass Amthabhai v. Maniklal Gordhandass*, I. L. R., 17 Bom., 648 (1890).

² *Maharaj Bahadur Singh v. Parash Nath Singh*, I. L. R., 31

Cal., 839 (1904).

³ Kerr, *Inj.*, 266, 268, 274, and generally pp. 266—280; Hilliard, *Inj.*, 641—644; Beach, *Inj.*, Ch. XXXVII, Easements Act, ss. 15, 28; Limitation Act, s. 26. *Achul Mahla v. Rajun Mahla*, I. L. R., 6 Cal., 812

in every direction cannot be acquired by prescription. In order so to acquire a right of way, the passage over the land must be in a definite line or in a particular direction.¹ The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.²

With reference to the English rule that a grantee is entitled to only one way of necessity and that the grantor had the right of electing it, the Bombay High Court in the case cited below,³ which was one concerning a privy, observed as follows :—"Whether it would be right in this country to apply the first part of this ruling under all circumstances, having regard to the prejudice of the higher castes, which prevails in this country against being brought into proximity with persons whose occupation it is to remove the contents of privies, may be open to doubt."

A license to use the land of another unless coupled with a grant is revocable at the will of the licensor, subject to

(1881). As to the acquisition of a right of way by implied grant, see *Charu Surnokar v. Dokouri Chunder Thakoor*, I. L. R., 8 Cal., 956 (1882); *Wutzler v. Sharpe*, I. L. R., 15 All., 270 (1893); *Ram Narain Shaha v. Kamala Kanta Shaha*, I. L. R., 28 Cal., 310 (1898); and cases there cited; as to covenant presumed to keep way open, see *Ranchordass Amthabhai v. Maniklal Gordhandass*, I. L. R., 17 Bom., 643 (1890).

¹ *Doorga Churn Dhur v. Kally Coomer Sen*, I. L. R., 7 Cal., 145 (1881); *Radhanath Sugrcharji v. Baidonath Seal Kabiraj*, 3 B. L. R., App., 118.

² Easements Act, s. 23, Explanation. A right of way of one kind

does not include a right of way of any other kind: *ib.*, s. 28. As to the right to do acts to secure enjoyment such as the right of deviation or obstruction, see *ib.*, s. 24.

³ *Esubai v. Damodar Ishwardas*, I. L. R., 16 Bom., 552, 559 (1891): in this case it was held that having regard to the class of persons concerned there was no reasonable necessity for two ways. As to privies, see also the following cases: *Madanmahan Sen v. Chandra Kumar Mookerjee*, 9 B. L. R., 328 (1872); *Vishnu v. Rango Ganesh Purandare*, I. L. R., 18 Bom., 382 (1893); *Jadoo Lal Mullick v. Gopawati Chunder Mookerjee*, 13 I. A., 77 (1886).

the right of the licensee to damages if revoked contrary to the terms of any express or implied contract.¹

Where a person has acquiesced in the interruption of his right of way and allowed another to erect a house on the pathway, a claim to enforce the right by the removal of the building will not be entertained.² A tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant over other land belonging to his landlord.³

Though a plaintiff setting up a right of way must succeed not only *secundum probata* but also *secundum allegata* a too technical view must not in this country be taken of the pleadings.⁴ Whenever a claim to a right of way and its infringement has been made out, the Court will interfere by Injunction, in proper cases and where the circumstances warrant that relief, for the protection of that right. If the damage is unsubstantial and trifling, the Court may refuse to interfere by Injunction, but where a plaintiff is held to be entitled to the user of a right of way and the inconvenience caused to him is real and substantial the Court will grant an Injunction against its obstruction.⁵ In the undermentioned case⁶ the plaintiff sued to obtain an Injunction restraining the defendants from erecting a door to a *khadki* (or small street with a door at one end and containing five or six houses on each side): from raising the level of the doorway above its original level and from executing any building work there which might cause obstruction or difficulty to the passing

Injunctions
against ob-
struction of
way

¹ *Prosonna Coomar Singha v. Ram Coomar Ghose*, I. L. R., 16 Cal., 640 (1889).

² *Beni Madhab Das v. Ramkalyan*, 1 R. L. R., S. C., 213 (1868).

³ *Udit Singh v. Kashi Ram*, I. L. R., 14 All., 185 (1892).

⁴ *Ranchordass Amikabhai v. Ma-*

neklali Gordhandass, I. L. R., 17 Bom., 648, 655, 656 (1890); see ante, p. 185.

⁵ *G. I. P. Railway Company v. Nowroji Pestanji*, I. L. R., 10 Bom., 390 (1885).

⁶ *Maganlal v. Chhotalal*, I. L. R., 26 Bom., 136 (1901).

of cattle, carriages, carts and fire engines through the doorway or over the land of the *khadki*. The plaint also contained a prayer for such other relief as the Court might think fit. After filing the plaint the plaintiff applied for an *interim* Injunction pending the hearing of the suit, which, however, was refused. The defendants thereupon erected the door, and at the hearing contended that inasmuch as the plaint prayed only to prevent the erection of the door and not for its removal when erected, the plaintiff could not obtain the latter relief in the suit, but must file a fresh suit. The Lower Court dismissed the suit, holding that on the erection of the door a new and different cause of action had arisen for which a fresh suit must be filed. On appeal *Held* (reversing the decree and remanding the case) that on the suit as framed the Court could grant a mandatory Injunction for the removal of the door. The suit was rightly framed in the light of the circumstances which existed when it was brought. It was the defendant's subsequent conduct which rendered it necessary that the plaintiff should be given, as prayed for in his plaint, such other relief as the Court might think fit.

A highway, which is not an easement properly so-called may be created either by statute or by the dedication to the public by the owner of the soil of the occupation of the surface of his land for the purpose of passing and repassing. But an owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public over the land so dedicated and may exercise all other rights of ownership, not inconsistent with such dedication. The dedication may be for special uses or for a limited purpose, but not to a limited class of persons or for a limited time. The soil of the highway up to the centre of the road is presumed in the absence of other evidence of ownership, to belong to

the owners of the land on each side subject to the right of passage to the public. Enjoyment and user of a way by the public is evidence from which an intention to dedicate may be presumed.¹

A class of cases in which the equitable remedy by Injunction is often sought are nuisances to public roads or highways.² The public as well in India as in England have the right to pass and repass along a public highway so long as they do so peaceably and properly.³ But speaking generally no action can in England be maintained for a public injury. Therefore an action does not lie for obstructing a man's passage in a highway, because ordinarily he has no more damage than others of the Queen's subjects; but the party causing the obstruction must be proceeded against by indictment. If, however, the person has sustained more particular damage by the nuisance than the public in general, as if any accident occur to him, or he be obliged to go a greater distance and be thereby put to an expense in the conveyance of his goods or otherwise, then he may sue the party causing it. So where in a suit for the removal of an obstruction in a public pathway it was found by the Courts below that the plaintiffs were deprived of the only means of grazing their cattle by the obstruction and that they lost some cows thereby, it was *held* that the injury caused to the plaintiffs, by the obstruction of the way, leading from the village where they resided to that in which they had

¹ See Kerr, *Inj.*, 281—288 and cf. following decisions on highway: *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga*, I. L. R., 2 Bom., 457 (1877); *Harrendro Coomarr Chowdhry v. Taramoni Chowdhry*, 7 C. L. R., 272 (1880); *Nihal Chand v. Azmat Ali Khan*, I. L. R., 7 All., 362 (1885); *Fatehyab Khan v. Mu-*

hammad Yusuf, I. L. R., 9 All., 434 (1887).

² Kerr, *Inj.*, 281; *Mott v. Schofield*, 20 Eq., 24; *Atty.-Genl. v. Shrewsbury Bridge Co.*, 21 Ch. D., 752, and other cases there cited.

³ See as to this *Harrison v. Duke of Rutland* (1893), 1 Q. R., 142.

fields and pastures was peculiar to them and to their calling, and it caused them substantial loss of time and inconvenience; and that it was sufficient to entitle the plaintiffs to maintain the action, but it was held also that the death of the cows was too remotely and indirectly connected with the obstruction to furnish a cause of action. On the other hand, in the undermentioned case,¹ the plaintiffs who were Mussulmans, sued to establish their right to carry *tabuts* in procession along a certain road to the sea, and alleged that the defendants (also Mussulmans) obstructed them in doing so. The plaint, however, did not allege any personal loss or damage to the plaintiffs, arising from the obstruction. Both the lower Courts found, as a fact, that the road along which plaintiffs desired to carry their *tabuts* to the sea was a public road. *Held* in special appeal that plaintiffs could not maintain a civil suit in respect of such obstruction, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of the religious or sentimental gratification arising from carrying *tabuts* along a public road is not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.

Section 10 of Bengal Act III of 1864 does not deprive a person of any right of private property that he may have in land used as a public road, nor does it vest the subsoil of such land in a municipality; and when such

¹ *Abdul Miah v. Nasir Mahommed*
I. L. R., 22 Cal., 551 (1895).

² *Satku Valad Kadir Saware v.*
Ibrahim Aga Valad Mirsa Aga, I. L.
R., 2 Bom., 457 (1877). Authorities
as to what constitutes special damage

sufficient to sustain a civil suit in such
cases referred to. *Siddewara v*
Krishna, I. L. R., 14 Mad., 177 (1890);
Fatehyab Khan v. Muhammad Yusuf,
I. L. R., 9 All., 434 (1887).

land is no longer required as a public road, the owner is entitled to claim its possession.¹

English law does not allow an easement of privacy. (viii) Privacy. Nor does the law of India admit of such a right being acquired by prescription. But Illustration (b) to section 18 of the Easements Act shows that the Legislature intended that an easement of privacy should be acquirable by local custom and the existence of such a custom in various parts of India as in Gujerat and the North-West Provinces and Punjab has been recognised.² Where such a custom is judicially recognised and has been proved, an Injunction will be granted against a threatened invasion or infringement of the customary right.

Injunctions
to preserve
privacy.

§ 84. Section 55 of the Specific Relief Act in express terms makes the exercise of the Court's mandatory power discretionary.³ The law relating to the issue of mandatory Injunctions in cases of light and air was laid down, and the English and Indian authorities reviewed in the case of *Benode Coomaree Dossee v. Soudaminy Dossee*,⁴ by Wilson, J., who said :—

Mandatory
Injunctions.

“This case so far as it relates to the granting of a mandatory Injunction, is of undoubted importance to suitors in this Court, and it seems to me that the law on the point has been somewhat misapprehended in the Court below. It rather seems to have been assumed that, if the cause of action, which undoubtedly existed, was established,

¹ *Modhu Sudan Kundu v. Promoda Nath Roy*, I. L. R., 20 Cal., 732 (1893); and see also as to the N.-W. P. and Oudh Municipalities Act; *Nihal Chand v. Azmat Ali Khan*, I. L. R., 7 All., 362 (1885).

² See cases cited in note 3 at pp. 8, 9 ante, and in particular *Gokal Prasad v. Radho*, I. L. R., 10 All., 358 (1888), in which all the previous decisions are exhaustively discussed.

³ *Ghansham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 492 (1894). As to the form of a mandatory Injunction before the Specific Relief Act, see *Ratanji H. Bottlewalla v. Edatji H. Bottlewalla*, 8 Bom. H. C. R., O. C. J., 196 (1871), and as to that Act, see s. 55 and illustrations thereto.

⁴ I. L. R., 16 Cal., 252, 264—266 (1889).

a mandatory Injunction, to pull down the defendant's building, or so much of it as might be necessary, would follow as a matter of course. The principal authorities on the subject have been cited and their effect, I think, is plain.

The cases have all fallen under one or other of two classes. The first kind of case is that of a man who has a right to light and air, which is obstructed by his neighbour's building, and who brings his suit and applies for an Injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere with his light and air; a number of cases under that head have been cited. A leading case is that of *Dent v. The Auction Mart Company*.¹ To the same class belong *Aynsley v. Glover*,² *Smith v. Smith*,³ *Krehl v. Burrell*,⁴ *Greenwood v. Hornsey*.⁵ Those cases all establish that although the remedy by mandatory Injunction is always in the judicial discretion of the Court, and the circumstances of each case may be taken into consideration, still as the general rule, and in the absence of special circumstances, if the injured man comes to Court on the first opportunity, after the buildings have been commenced, or on the first opportunity, after he has seen that they will interfere with his rights, an Injunction being necessary, a mandatory Injunction is granted.

On the other hand, however, there may be circumstances which will lead the Court to refuse the Injunction, as has certainly been done in two cases: *Senior v. Pawson*⁶ and *Holland v. Worley*.⁷

¹ L. R., 2 Eq., 238.

² L. R., 18 Eq., 544.

³ L. R., 20 Eq., 500.

⁴ L. R., 7 Ch. D., 551.

⁵ L. R., 33 Ch. D., 471.

⁶ L. R., 3 Eq., 330.

⁷ L. R., 26 Ch. D., 578.

The other class of cases comes under a different principle. When a plaintiff has not brought a suit or applied for an Injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed a mandatory Injunction will not generally be granted, though there might be cases where it would be.

This is shown by the case of *Isenberg v. The East Indian House Estate Company*;¹ *Curriers Company v. Corbett*;² *Durell v. Prichard*.³ The latter case came before the Lords Justices from a decision of the Master of the Rolls, and L. J. Turner lays down that it is within the jurisdiction of the Court to grant a mandatory Injunction, but it ordinarily abstains from granting one unless under very special circumstances. The next case I would refer to—*City of London Brewery Company v. Tennant*,⁴ where the jurisdiction of the Court to grant a mandatory Injunction is re-affirmed, but it is added in the judgment of Lord Selborne: 'We know of course, that the Court is not in the habit of doing so, except under special circumstances, but those circumstances may exist.' The same law is followed in *Stanley of Alderley v. Shrewsbury*.⁵ There have been cases where mandatory Injunctions have been granted. In *Baxter v. Bowen*,⁶ a mandatory Injunction was granted by Vice-Chancellor Bacon, and his judgment was affirmed in appeal.⁷ But in that case the circumstances were peculiar. The thing removed was a mere shed, and there was something like an agreement between the parties that no objection should be taken on the ground of complainants having delayed in bringing their action.

¹ 3 DeG. J. & S., 263.

² 2 Dr. & Sm., 355.

³ L. R., 1 Ch. App., 244.

⁴ L. R., 9 Ch. App., 212.

⁵ L. R., 9 Eq., 616.

⁶ 23 W. R. (Eng.), 334.

⁷ 23 W. R. (Eng.), 805.

That case has been explained as a very special case in *Gaskin v. Ball*,¹ where it is said: 'The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter v. Bowen* was a very special case, just one of those exceptions which prove the rule.' Certain circumstances have been relied on in this case as making it a special one, particularly the notice which the plaintiff's witnesses say they gave to the defendants, not to continue the building so as to obstruct the plaintiff's rights. The learned Judge in the Court below has believed these witnesses, and I accept his finding; but the authorities show that mere notice, not followed by legal proceedings, is not sufficient. That is how matters stand, so the English authorities, and, I think, the Indian authorities are to the same effect. I had occasion to refer to the authorities in the case of the *Shamnugger Jute Factory v. Ram Narain Chatterjee*.² I only refer to that case, because on pages 200, 201, a good many of the authorities are collected. A Bombay case was cited, which, it was contended, is inconsistent with this view of the law: *Jamnadas Shankarlal v. Atmaram Harjivan*.³ There, under the circumstances of the case, a mandatory Injunction was granted; but we cannot, I think, regard that case as laying down any broad rule that mandatory Injunctions are to be granted as a matter of course; but it appears to me the law on this point is well settled."⁴

¹ L. R., 13 Ch. D., 329.

² I. L. R., 14 Cal., 189.

³ I. L. R., 2 Bom., 138, in which case the circumstances constituting delay and acquiescence were discussed. It is for the defendant to show that the right has been lost by acquies-

cence; *Nandkishor Balgovan v. Bhagubhai Prabhulabdas*, I. L. R., 8 Bom., 95 (1883).

⁴ *Benode Coomaree Dossee v. Sou-daminey Dossee*, I. L. R., 16 Cal., 252, 264—266 (1889), per Wilson, J.

Prompt action is very essential in these cases, if an Injunction is the desired remedy.¹ And it will not, in general be granted, if the plaintiff has allowed the building to be erected without complaint.²

Notice, that an act complained of is objected to, removes all objections to the mandatory form of the Injunction, that is, deprives the defendant of all right to complain of its particular form.³ If such act is continued or carried on, after clear and distinct notice of objection, or, if during the action an undertaking has been given to pull down the building, if so ordered at the trial, and the injury caused is of a serious nature, the jurisdiction to grant this form of Injunction will be exercised more freely than in cases where complaint is not made until after it is completed.⁴

But a plaintiff should do something more than complain: he should take steps to restrain the building; for prompt action is very essential in cases where a mandatory Injunction is the desired remedy.⁵ So mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings

followed 29 mad
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¹ *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 492 (1894).

² *Abdul Rahman v. Emile*, I. L. R., 16 All., 69, 72 (1893), *v. ante*.

In *Baxter v. Bowen*, however, 44 L. J., N. S., Ch., 625, the building which was a mere shed was removed. See generally as to acquiescence and conduct Specific Relief Act, s. 56. *els. (h) (j)*; *Beni Madhab Das v. Ram-jay Bokh*, 1 B. L. R., A. C., 213 (1868). Delay may be consistent with non-acquiescence! *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 133, 137 (1877); and acquiescence itself is no bar if caused by misrepresentation, *Lavies v. Marshall*, 10 C. B., N. S., 711, or the like. See *Kerr, Inj.*, 19.

³ *Ratanji Hormasji Bottlewalla v.*

Edalji Hormasji Bottlewalla, 8 Bom. H. C. R., 181, 196 (1871); citing *Jacomb v. Knight*, 32 L. J., Ch., 601; 3 D. J. & S., 538; see *Jamnadas Shankarlal v. Atmaram Harjivan*, I. L. R., 2 Bom., 138, 139 (1877); *Kerr, Inj.*, 49.

⁴ *Jacomb v. Knight*, *supra*; *Kreh v. Burrell*, 7 Ch. D., 551; 11 Ch. D., 146; *Hepburn v. Lordan*, 2 H. & M., 345; *Smith v. Day*, 13 Ch. D., 652; *Grand Junction Canal Co. v. Shugar*, 6 Ch., 489; *Greenwood v. Hornsey*, 33 Ch. D., 471. See *Benode Coomaree Dossee v. Soudaminy Dossee* I. L. R., 16 Cal., 266 (1889).

⁵ *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, I. L. R., 18 Bom., 474, 492 (1894); *Benode Coomaree Dossee v. Soudaminy Dossee*, I. L. R., 16 Cal., 252 (1889).

a sufficiently special circumstance for granting relief by a mandatory Injunction.¹

Where the defendant, upon receiving notice of motion for an Injunction, endeavoured to anticipate the action of the Court by hurrying on his building, an interlocutory mandatory Injunction was granted ordering that what he had erected ought to be at once pulled down, without regard to the ultimate result of the action. It was observed that to refuse an interlocutory Injunction, in such a case, would be to hold out an encouragement to other people to hurry on their buildings in the hope that, when they were once up, the Court might decline to order them to be pulled down.²

Where the defendants, after the Lower Appellate Court had passed a decree in their favour, carried up a wall complained of, notwithstanding an appeal to the High Court, the latter directed a mandatory Injunction to issue to them to remove it.³

The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the Court will grant relief by issuing a mandatory Injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.⁴

¹ *Benode Chomaree Dossee v. Sou-daminey Dossee*, supra; see also *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai*, supra, p. 492.

² *Daniel v. Ferguson*, L. R., 1891, 2 Ch., 27; so also, where the defendant evaded service of the writ for several days and, in the meantime proceeded with its building till sub-

stituted service on him was effected: *Von Joel v. Hornsey*, L. R., 1895, 2 Ch., 774. See also *Shelfer v. City of London Electric Lighting Co.*, L. R., 1895, 1 Ch., 287, 322, 323, cited ante.

³ *Kadarbhai v. Rahimbhai*, L. L. R. 13 Bom., 674, 675 (1889).

⁴ *Jamnadas Shankarlal v. Atma-ram Harjivan*, I. L. R., 2 Bom., 133,

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money-compensation, is no ground for depriving the plaintiff of a mandatory Injunction in his favour, except under special circumstances.¹

Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall. *Held* that the mere fact that the defendant when rebuilding his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, was not sufficient in itself to justify the Court in granting a mandatory Injunction ordering its removal. It should also be satisfied that the new wall so materially interfered with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement could not adequately be compensated by damages. It should also satisfy itself, whether the plaintiff protested against the new wall being built, whilst in course of erection, or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages.²

An Injunction, in a case of light or air, if mandatory, should only order the demolition of so much of the servient owner's building as interferes with the access of light to which the dominant owner is entitled, and, if

(1877); in *Ratanji H. Bottlewalla v. Edalji H. Bottlewalla* also (8 Bom. H. C. R., O. C. J., 81 *supra*), notice was given protesting against the building, and a mandatory Injunction was therefore granted.

¹ *Jamnadas Shankarlal v. Atma-*

ram Harjivan, I. L. R., 2 Bom., 133, 138, 139 (1877): such special circumstances existed in *Senior v. Pearson*, L. R., 3 Eq., 330.

² *Ranchod Jamnadas v. Lallu Haridas*, 10 Bom. H. C. R., 95 (1873).

prohibitory, should only restrain him from erecting or continuing any building, so far as it would cause such interference.¹

To determine what demolition of a house is necessary, the Court executing the decree may be directed to employ a professional man agreed on by the parties, if they can agree, or nominated by the Court, if they cannot.²

¹ *Bala v. Mahasu*, I. L. R., 20 Bom., 788 (1896). *Harjivan*, I. L. R., 2 Bom., 133 (1877), as to the enforcement of the

² *Jamnadas Shankarlal v. Almaram* Injunction, v. *ante*, § 45.

CHAPTER XI.

INJUNCTIONS AGAINST INFRINGEMENT OF COPYRIGHT, TRADE-MARKS AND PATENTS.

<p>§ 85. COPYRIGHT.</p> <p>§ 86 INJUNCTIONS AGAINST IN- FRINGEMENT OF COPYRIGHT.</p> <p>§ 87. TRADE-MARKS.</p>	<p>§ 88. INJUNCTIONS AGAINST IN- FRINGEMENT OF TRADE-MARKS.</p> <p>§ 89. PATENTS.</p> <p>§ 90. INJUNCTIONS AGAINST IN- FRINGEMENT OF PATENTS.</p>
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§ 85. Copyright means the sole and exclusive liberty ^{Copyright.} of printing or otherwise multiplying copies of any book¹ already published and is the creation of Statute, while what is sometimes called "copyright at common law" is really an incident of property, and not "copyright" in the strict sense. The rights of the author before publication are these:—He has the undisputed right to the MSS., he may withhold or communicate it, and communicating he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases on the use of it; and the fulfilment of the annexed conditions he may proceed to enforce and for their breach he may claim compensation. The author may prevent the publication of his work until he himself has made it public. The common law gives a man who has composed the work a right to that composition just as he has a

¹ 5 & 6 Vic., c. 45, s. 2: "Book means and includes every volume phlet, sheet of letter-press, sheet of music map, chart or plan separately published"

right to any other part of his personal property. This right is really an incident of property and not copyright in the strict sense. But though a man has this right, the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of forever copying his own composition after he has published it to the world is a totally different thing; copyright is the exclusive right of multiplying copies of a work already published and is regulated by Statute.¹

For an intellectual work to be capable of protection as copyright it must be (1) innocent, that is, not seditious or libellous (the libel being against the State), not immoral, not fraudulent or professing to be what it is not with intent to deceive, and according to English law not blasphemous; (2) the work must have literary value, though very little usefulness or material value will suffice to obtain protection;² and (3) the work must be original.³

There cannot be in general any copyright in the title or name of a book. Where a man sells a work under the name or title of another man, or another man's work, that is not an invasion of copyright but a common law fraud.⁴

A translation and a copy stand on different footing; in the former the skill and time and labour of another

¹ *Jeffreys v. Bunney*, 4 H. L. C., 815; *Suck v. Priestler*, 19 Q. B. D., 629.

² So a perforated card with some verses on it which throwing the "Shadow of the Cross" on the wall went by the name of the Crisograph (*Cable v. Marks*, 47 L. T., 432), and an album for holding photographs, seven of the pages of which bore pictures of castles with short letter-press descriptions (*Schove v. Schminke*, 33 Ch. D., 546), and a card for the face of a barometer (*Davis v. Comitti*, 52 L. C., 539) were

held not to be "books" capable of copyright. See *Scrutton's Law of Copyright*, 105—107. The privilege is, however, not confined to works of literary merit in the strict sense of the word. So a book of statistics, a guide-book, directory and the like may be the subject of copyright, see *Kerr. Inj.*, 360 as to collection of advertisement, see *Lamb v. Evans*, 1893, 1 Ch., 218.

³ *Scrutton, op. cit.*, 104—111.

⁴ *Dicks v. Yates*, 18 Ch. D., 76, 89.

have been employed and a book has been produced available for a different class or race of readers. A person who translates a book into another language is not thereby guilty of an infringement of copyright.¹ It is said that there is no copyright in news. But there is or may be copyright in the particular forms of language or modes of expression by which information is conveyed and not the less so because the information may be with respect to the current events of the day. A practice by newspapers to copy from other newspapers is no defence to a copyright action.²

The Act regulating the subject of literary copyright in India is Act XX of 1847.³ The Preamble of that Act recites that doubts might exist whether the right called copyright could be enforced by the common law of England in those parts of British India into which the common law of England had been introduced, and whether the said right could be enforced by virtue of the principles of equity and good conscience in other parts of British India, and whether the Statute 5 and 6 Vic., c. 45, had made appropriate and sufficient provision for the enforcement in every part of British India of the said right by proprietors thereof. The Act provides that the

¹ *Munshi Shaik Abdurrahman v. Mirza Mahomed Shirazi*, I. L. R., 14 Bom., 586 (1899): but see observations in Kerr, Inj., 369, where it is stated that it is difficult to see upon what principle the rule that a translation is not an infringement can be upheld.

² *Walker v. Steinkopf*, 1892, 3 Ch., 490. As to copyright in a newspaper see *Cole v. Devon and Exeter Constitutional Newspaper Cy.*, 40 Ch. D., 508.

³ Repealed partly by Act XVII of 1862; IX of 1871; XIV of 1870;

XVI of 1874; XII of 1876; I of 1879; as to the subject of artistic copyright, see Scrutton's Law of Copyright, 2nd Ed., 143; Kerr, Inj., 378—384; as to photographs, see *Pollard v. Photographic Cy.*, 40 Ch. D., 345; as to reviews and periodicals, see Act XX of 1847, s. 10; Kerr, Inj., 370. The author of a contribution to a periodical who has not parted with his copyright to the proprietor of the periodical may sue an infringer before publishing his contribution in a separate form; *Johnson v. George Neumeier, Ltd.*, 1894, 3 Ch., 663.

copyright in a book published in the lifetime of its author within British India after the passing of the Act of Parliament, 3 and 4 Wm. 4, c. 85, endures for the natural life of such author and for the further term of seven years commencing at the time of his death and is the property of the author and his assigns. If, however, the above term of seven years expires before the end of 42 years from the publication of the book, the copyright endures for 42 years. The copyright of a book published after the death of its author and after the passing of the abovementioned Act endures for 42 years from the first publication thereof, and is the property of the proprietor of the author's manuscript from which such book is first published, and his assigns.¹ It further makes provision against the suppression of books of importance,² the registration and assignment of copyright³ and suits for infringement of copyright.⁴ The offender against copyright is liable to a suit in the highest local Court exercising original civil jurisdiction. As the class of cases provided for by section 7 of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in section 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the Mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865. But sched. I of Act XII of 1876, Amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts.⁵

¹ Act XX of 1847, s. 1.

² *Ib.*, s. 2.

³ *Ib.*, ss. 3, 5, 6 (as to the registration of books and as to printing presses and newspapers, see Act XXV

of 1867).

⁴ *Ib.*, s. 7.

⁵ *Hameedoolah v. Mahomed Ashgar Hossein*, I. L. R., 6 Cal., 499 (1880).

Copyright in designs is regulated in British India by Act V of 1888. A design means some peculiar shape, configuration or form given to an article, or arrangement of lines, or the like used on, or with, an article, but not the article itself; and copyright means the exclusive right to apply a design to an article.¹ When a design is registered, the proprietor has, subject to the other provisions of the Act, copyright in the design for five years from the date of registration.² The Act provides for the registration of designs and for suits for the infringement of copyright.

§ 86. A person who infringes the copyright of another is liable to an action for damages or account and for an Injunction. So if *A* pirates *B*'s copyright, the latter may obtain an Injunction to restrain the piracy unless the work of which copyright is claimed is libellous or obscene.³ There may be a claim for an Injunction to restrain the future infringement of the copyright and for a mandatory order for delivery of copies which have been printed in violation of the copyright. So in the case given above the Court may also order the copies produced by piracy to be given up and destroyed.⁴ The plaintiff must establish the right claimed and its infringement, or threatened infringement, and he must come for relief with due diligence since delay or acquiescence will be fatal to the application unless accounted for. Nor can a man have relief if his own conduct has led to the state of things that occasions the application. The doctrine applies not only to the cases of his conduct towards the particular person with

Injunctions
against
infringement
of copyright.

¹ Act V of 1888, s. 50; for the law anterior to this Act see *Baker v. Sutherland*, 8 B. L. R., 298 (1871).

² *Ib.*, s. 53. See generally Kerr,

Inj., 385—387.

³ Act I of 1877, s. 54, ill. (v); see generally Kerr, *Inj.*, Ch. VIII.

⁴ *Ib.* s. 55, ill. (g).

whom the controversy subsists, but also to cases where his conduct with others may influence the Court in the exercise of its equitable jurisdiction. The interference of the Court by Injunction being founded on pure equitable principles, a man who comes to the Court must be able to show that his own conduct in the transaction has been consistent with equity: a book accordingly which is itself piratical or which is immoral, indecent, seditious or libellous, cannot be protected from invasion.¹ No proprietor of copyright in any book may sue for any infringement of such copyright unless an entry has been made in the registry book.² The title to copyright is complete before registration which is only a condition precedent to the right to sue. And, therefore, it was held to be no valid objection to a suit that the infringement of copyright took place before registration.³

Infringement of copyright has been summarised as follows:—"Literary property can be invaded in three ways and in three ways only:—(1) Where a publisher in this country publishes an unauthorised edition of a work in which copyright exists, or where a man introduces to sell a foreign reprint of such a work, that is open piracy. (2) Where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour, that is literary larceny.

"These are the only two modes of invasion against which the Copyright Acts have protected an author. (3) There is another mode which, to my mind, is wholly irrespective of any copyright legislation, and that is where a man sells a work under the name and title of another man or another man's work. That is not an invasion of

¹ Kerr. Inj., 348, 349, *et ibi* *casus*.

² *Macmillan v. Suresh Chunder Deb*,

³ Act XX of 1847, s. 14; *ROMANIC* I. L. R., 17 Cal., 962 (1890).
v. *W. Thacker*, 1 Hyde, 9, 13 (1864).

copyright ; it is common law fraud and can be redressed by common law remedies."¹

If a case has been made out for an Injunction, the extent to which the Injunction ought to go (that is whether the Injunction shall be against the whole work or only against a part of it) must depend in each case upon the extent of the piracy and the nature of the work. If the pirated matter is considerable in amount and is so intermixed with the original matter that it cannot be separated, the Injunction will go against the whole work generally. If the pirated matter can be separated from the original matter, the Injunction will issue only against that particular part. If the pirated matter is not considerable in quantity or of much value in quality, or if, though considerable in value, it is very small in quantity and quite out of proportion to the mass of original matter, the Court will not, as a general rule, interfere by Injunction, but will leave the plaintiff to his remedy by damages.² The principle of assessing damages in all cases of literary piracy is that the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff and to pay to the plaintiff the profit which he would have received from the sale of so many additional copies.³

It is no infringement of the copyright of a book to make *bonâ fide* extracts from it, or a *bonâ fide* abridgment of it, or to make use of the same common materials in the composition of another work, but what constitutes a *bonâ fide* use of a previous publication is often a matter of most embarrassing enquiry.⁴ Where a work has not

¹ *Dicks v. Yates*, 18 Ch. D., 78, 90.

² *Kerr, Inj.*, 350, 351.

³ *Pike v. Nicholas*, 2 Ch., 260.

⁴ *Roussac v. Thacker*, 1 Hyde, 9,

23 (1864) : a subsequent writer may make a fair and legitimate use of a prior publication, but he may not copy or imitate it to such an extent

been published an Injunction will be refused in the absence of satisfactory evidence of the actual contents of the threatened publication.¹

It is not necessary that the subject-matter of a book must be perfectly new. A new arrangement of old matter will give a right to the protection afforded by the law of copyright. The plaintiff, a bookseller, in 1884, brought out a new and annotated edition of a certain well-known Sanskrit work on religious observances entitled "*Vrtraj*," having for that purpose obtained the assistance of Pandits, who recast and re-arranged the work, introduced various passages from other old Sanskrit books on the same subject, and added foot-notes. In 1885 the plaintiff registered the copyright of this work. In 1886 the defendant printed and published an edition of the same work, the text of which was identical with that of the plaintiff's work, which moreover contained the same additional passages, and the same foot-notes at the same places with many slight differences. *Held*, that the plaintiff's work was such a new arrangement of old matter as to be an original work and entitled to protection, and that as the defendants had not gone to independent sources for their material, but had pirated the plaintiff's work, they must be restrained by Injunction. *Held*, also, that an account of the net profits made by the defendants by the sale of the plaintiff's book could be ordered notwithstanding the provisions of section 12 of Act XX of 1847, as the result of the account would be to give to the plaintiff what he could have claimed as damages under that section.²

as to damage the property of the author in his copyright. See Kerr, *Inj.*, 362—369.

¹ *Morris v. Wright*, 5 Ch., 279, 283.

² *Gangavishnu Shrikisondas v. Moreahwar Bapuji Hegishke*, I. L. R., 13 Bom., 358 (1888).

The plaintiffs, the partners of a firm M. & Co, were the proprietors, registered under 5 and 6 Vic., c. 45 of the copyright of a selection of songs and poems, composed by numerous well-known authors, which was prepared by one *P.* and originally published in 1861. Since original publication the book ran through several editions, one of which was published in the year 1882. The book was registered under the provisions of the above Statute on the 8th February 1889, the name of both the publisher and proprietor being entered in the register as M. & Co., the firm's address being given, and the date of the first publication was entered as the 19th July 1861. The poems contained in the book were arranged by *P.*, not in chronological order of their production, but in gradation of feeling and subject, and at the end of the book were given some notes, critical and explanatory. On the 15th January 1889, the defendant published, at Calcutta, a book containing the same selection of poems and songs as was contained in *P.*'s book. The arrangement, however, of the defendant's book differed from *P.*'s, in that the poems of each author were placed together and in order of their composition. In one of the poems the defendant printed forty lines, which were contained in the work by the original author, but which were omitted by *P.*, and in another poem one line. In many places there were differences of reading in the two books, and in more of punctuation. In the defendant's book some of the titles to the poems, which had been assigned thereto by *P.* and not by the original authors, appeared, as well as a good many of *P.*'s notes, some with acknowledgment and some without. With each poem the defendant gave a mass of notes, critical and explanatory, and he also prefixed to the poems of each author a biographical notice. The suit was instituted

on the 27th February 1890, and the plaintiffs complained that the publication of defendant's book constituted a breach of their copyright and prayed for the usual relief by way of Injunction and damages. They contended that although the copyright in the works of the original authors had long lapsed, they were entitled to the copyright in the "selection" made by *P.*

It was contended on behalf of the defendant that there could be no copyright in such a selection; that if any existed, the defendant's book did not infringe it; that the plaintiffs' book being registered as first published in 1861 and the infringement charged being in respect of the edition of 1882, and there being no evidence to show that the same selection was contained in the latter as in the former edition, the plaintiffs were not entitled to the relief prayed for; that the author of the plaintiffs' book being *P.*, in whom the copyright would *primâ facie* be, and the property being registered as in the plaintiffs' firm, the registry was bad, as the assignment of the copyright to the plaintiffs was not shown; that the registration was also bad, as the entry merely contained the name and address of the plaintiff's firm; that the publication of the defendant's book having been before the date of registration, the suit would not lie, and that the suit was barred by the special limitation provided by section 26 of the Statute 5 and 6 Vic., c. 45. *Held*, that such a "selection" could be the subject-matter of copyright, the true principle applicable to such cases being that one person is not at liberty to use or avail himself of the labour which another has been at for the purpose of producing his work, and so take away the result of the other's labour, or in other words his property. *Held*, further, that the defendant's book constituted a piracy of the plaintiffs' book, and had infringed their copy-

right, and that they were entitled to the relief they sought. *Held*, also, that in the absence of any evidence to the contrary it was reasonable to assume that successive issues of a book of this kind under the same name are substantially the same book; that it was unnecessary that the registry should show an assignment of the copyright by *P.* to the plaintiffs;¹ that the registration was not had by reason of the names and addresses of the partners of the firm not being given;² that the title to copyright is complete before registration, which is only a condition precedent to the right to sue, and that the plaintiffs had not, therefore, lost their right of action by reason of the defendant's book being published before theirs was registered;³ and that, assuming that the rule of limitation provided by section 26 of the Statute was applicable, the suit was not barred by limitation.⁴ The Court accordingly decreed a perpetual Injunction restraining the printing or sale of the defendant's book as being an infringement of the plaintiff's copyright.⁵

§ 87. A trade-mark differs both from copyright Trade-mark. which has already been dealt with and from a patent, the subject-matter of the following paragraph. A copyright like a patent relates to the substance of an article but differs in that it has reference to a literary instead of a material production. A trade-mark does not protect the substance of the article to which it is attached from being imitated, but it identifies an article and indicates the source to which that article is to be attributed.⁶

¹ *Weldon v. Dicks*, L. R., 10 Ch. D., 247, followed.

² *Low v. Routledge*, 33 L. J., Ch. 717; and *Weldon v. Dicks*, *supra*, followed.

³ *Tuck v. Priester*, L. R., 19 Q. B. D., 629; and *Gourband v. Wallace*, 25 W. R., 604; W. N., 1877; p.

130, followed.

⁴ *Hogg v. Scott*, L. R., 18 Eq., 444, followed.

⁵ *Macmillan v. Suresh Chunder Deb*, L. L. R., 17 Cal., 951 (1890).

⁶ *Sebastian's Law of Trade Mark*, 3rd Ed., 16.

The Indian Penal Code defines a trade-mark to be a mark used for denoting that goods have been made, are manufactured, by a particular person, or as a particular time or place, or that they are of a particular quality.¹ A trade-mark is a mark used to denote that goods are the manufacture or merchandise of a particular person, and any symbol, mark, name, or combination of names, marks, and the like may be used as a trade-mark.

It must not be assumed that every ornament which may be applied to the case or flask or wrapper in which goods are exposed for sale are necessarily trade-marks. Such ornaments are often employed as mere devices to arrest attention and are not intended to convey any other meaning. To constitute them trade-marks they must have been adopted as symbols devised to distinguish a particular class of goods as the goods of class manufactured or selected by a particular manufacturer or merchant.²

The function of the trade-marks is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. It means the mark under which a particular individual trades and which indicates the goods to be his goods—either goods manufactured by him, or goods selected by him, or goods which in some way or other pass through his hands in the course of trade. It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by the person who owns the trade-mark.³ There may be a right to exclusive use of a trade-mark by traders who are importers only.⁴ “The benefits derivable from the recognition

¹ S. 478; this definition has been adopted by the Indian Merchandise Marks Act, 1889 (Act IV of 1889).

² *Lacergne v. Hooper*, 1 L. R. 8 Mad., 149, 153 (1884).

³ In *re Australian Wine Importers, Ltd.*, 41 Ch. D., 278; *Sebastian*,

op. cit., 3.

⁴ *Ralli v. Fleming*, 1 L. R., 3 Cal., 417 (1878); *Taylor v. Virasami*, 1 L. R., 6 Mad., 108 (1882); *Sebastian*, *op. cit.*, 4; *Seizo v. Provezende*, L. R., 1 Ch. App., 196.

of the exclusive right of a trader to his trade-mark are apparent from the consideration that the 'trade-mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the Court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded, not only as a matter of justice to him, but to prevent imposition on the public.' The protection of trade-marks is, therefore, beneficial to the public, since it enables them to buy with confidence that they are getting what they require; while at the same time it is beneficial to the manufacturer since it affords him the means of securing the benefit of the custom which he deserves and which is intended for him.'"¹

At common law, until the Judicature Acts, it was necessary to prove that an injury had been actually done and intentional deception on the part of the defendant. In equity it was enough to show that the defendant threatened to do and would, if not prevented, do that injury, and it was not necessary to prove an actual fraudulent intention, the remedy being obtainable if the defendant's conduct has been such as to produce the effects of fraud, though he may, in fact, have acted in perfect innocence.² It is not enough to say that there was no fraudulent intention. That is no reason why an Injunction should not be granted. Where the defendants sold goods bearing the same trade-mark

¹ Sebastian, *op. cit.*, citing *Manhattan Medicine Co. v. Wood*, 108, U. S. Rep., 218 (Amer.). To the same effect see observations in *Lavergne v. Hooper*, 1. L. R., 8 Mad., 149, 153 (1884).

² *Ib.*, 9, 13; as to the origin and history of the right of action in trade-mark cases, see judgment of Mellish, L. J., in *Singer Manufacturing Co. v. Wilson*, 2 Ch. D., 453.

as the plaintiff's merchandise, and the defendants stated that they had nothing to do with the ticket, as it had been sent them on goods from their constituent at Glasgow, and that they had telegraphed home to their constituent concerning the ticket, and it was argued that no fraud have ever been intended, the Court observed — "I do not think I have any option, if the marks, which defendants have used, are those of the plaintiffs; no matter what their intention was, a perpetual Injunction would be granted. In the meantime an interlocutory Injunction must issue. Obviously there is a close imitation. Interlocutory Injunction to issue with costs."¹

The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader. He cannot be allowed to use names, marks, letters and other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. Whether the defendant has infringed the plaintiffs' rights depends upon the question how far the defendant's trade-mark has such a resemblance to that of the plaintiffs' as to be calculated to mislead incautious purchasers.²

The general principle upon which the Courts exercise jurisdiction in the case of trade-marks has been stated to be that "a manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture.

¹ *Graham & Co. v. Kerr, Dodds & Co.*, 3 B. L. R., App., 4 (1869) to the same effect see *Hugh Balfour & Co. v. Edward, Dundar, Kilburn & Co.*, 1 Hyde, 270 (1863); (following *Millington v. Fox*, 3 My. & Cr.,

33); *Ewing & Co. v. Grant, Smith & Co.*, 2 Hyde, 185 (1864).

² *Badiache Aniline & Soda Fabrik v. Maneckji Shapurji Katrak*, I. L. R., 17 Bom., 584, 593, 594 (1893).

becomes the exclusive owner of that which is henceforth called his trade-mark. By the law of this country, and the like law prevails in most other civilized countries, he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property, the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners.¹ And so the Specific Relief Act declares that, for the purpose of section 51 which deals with the subject of perpetual Injunctions, a trade-mark is property.²

The common law remedy was by an action on the case for damages caused by the offender's fraud in which action it was necessary to show that the plaintiff had been accustomed to use a certain mark upon goods of his manufacture to denote that that was so, that that mark was known in the trade, and that the defendant had imitated the mark and sold goods bearing it, as and for the plaintiff's goods, with intent to defraud; the equitable remedy was by Injunction together with an account, or damages, if preferred.

The law as to trade-marks is now regulated in England by Statute³ which is not the case in this country save as to criminal proceedings under the Indian Merchandise Marks Act.⁴ There is no registration of trade-marks in India as there is in England. There being no acquisition by registration in this country, in order to establish a claim

¹ *Ransome v. Graham*, 51 L. J., Ch., 897, per Bacon, V. C. See *Goodfellow v. Prince*, 35 Ch. D., 13.

² Act I of 1877, s. 54, Explanation.

³ See 46 & 47 Vic., c. 57.

⁴ Act IV of 1889 as amended by Act IX of 1891; see also the Sea Customs Act (VIII of 1878), and the edition of the first mentioned Act by Reginald Gilbert, 2nd Ed., 1892.

to trade-mark, it must be shown that the mark has been applied by the plaintiff's properly, that is to say, that he has not copied any other person's mark and that the mark does not involve any false representation, and that the article so marked is actually a vendible article in the market. For no property in a trade-mark can be acquired except through the process of sale, or offering for sale in the market [of the] article to which the trade-mark is affixed.¹

Such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets.² A right to use a trade-mark may be created by license or assignment. There is no length of time required for the acquisition of a right to a trade-mark. As it may be acquired it may be abandoned, and no length of time is required to constitute an abandonment.³

The principle which applies to the case of a man selling his goods as the goods of another applies to the case of a man using the trade-name of another for the purpose of reaping the benefit of the reputation which the other has already acquired in the market. In imitations of trade-names used as such and not as trade-marks of goods, there is a difference from trade-marks proper: there is a false representation, but it is a representation not that certain goods are certain other goods, but that a certain establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade-mark, not being concerned with marks

¹ Sebastian, *op. cit.*, 96.

Mad., 149 (1884).

² *Lavergne v. Hooper*, 1. L. R., 8

³ *Ib.*, 154.

placed on vendible articles in the market, but still the Court has to proceed upon much the same lines. The same principles which apply to the right to use a name are also applicable to the use of a trade-name or partnership, form or style.¹

Where a name or word was originally or has become descriptive of an article, it cannot be protected as a trade-name. A trade-name may, however, be so appropriated by user as to come to mean the goods of the plaintiffs though it is not and never was impressed on the goods or packages so as to be a trade-mark. Where it is established that such a trade-name bears that meaning the use of that name or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs, may be the means of passing off their goods as and for the plaintiffs just as much as the use of a trade-mark; and the law, so far as not altered by legislation, is the same.²

§ 88. A trade-mark being property an Injunction will be granted when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of that property. So if *A* improperly uses the trade-mark of *B*, the latter may obtain an Injunction to restrain the user, provided that *B*'s use of the trade-mark is honest.³ Mention has already been made of the acquisition and proof of title to trade-mark; as to what degree of resemblance is necessary to constitute the fraudulent or colourable imitation of a trade-mark, it is impossible to

Injunctions
against
infringement
of trade-
marks.

¹ Kerr, *Inj.*, 399—401; Sebastian, *op. cit.*, 18. See also *Tussaud v. Tussaud*, 44 Ch. D., 678.

² *Singer Manufacturing Co. v. Loog*, L. R., 8 App. Cas., 32. See *Reddaway v. Schroder, Smidt & Co.*, 8 C. W. N., 151 (1903), S. C. in appeal, 9 C. W. N., 281 (1905), and cases

there cited.

³ Act I of 1877, s. 54, Ill. (w); and see *Archibald Orr Ewing v. Choonesholl Mullick*, Coryton, 150 (1865); and generally Kerr, *Inj.*, 394, *et seq.*; as to interlocutory Injunctions in particular, see Sebastian, *op. cit.*, 191, 192.

lay down any general rule. In each case as it occurs it must be ascertained whether there is such a resemblance as that ordinary purchasers purchasing with ordinary caution are likely to be misled.¹ The same considerations of policy which prior to the regulation of trade-marks by Statute induced the English Courts to protect them, and to recognise in a manufacturer or selector a right under certain limitations to the distinguishing mark or title under which he offered his goods to the public and to mulct in damages any other person who intentionally infringed a trade-mark so adopted, have induced the Courts in this country to accept as consonant with equity and justice the general rules which obtained in commercial countries respecting trade-marks. Of course the Courts in British India would only recognise the particular provisions of the Statute law of other countries in so far as may be necessary for the determination of rights which have been acquired under such provisions, unless indeed by the law of England or British India they are directed to do so.² Though the principles of English law are generally applicable, it must not be supposed that cases in this country are always to be decided on the same principles as those which are followed in England.³

The ground upon which a person is restrained from using another's trade-mark is, that he is gaining an advantage by the use of a particular trade-mark, which is the property of another. It is not necessary to prove intentional fraud, or to shew that persons have been actually deceived. It is sufficient, if the Court be

¹ See *Kerr, Inj.*, 415, *et seq.*

² *Laverne v. Hooper*, I. L. R., 8 Mad., 152, 153 (1884).

³ *Hugh Balfour & Co. v. Edward, Dundar, Kilburn & Co.*, 1 Hyde, 270 (1863).

satisfied, that the resemblance is such as would be likely to cause the one mark to be mistaken for the other.¹

“No trader can complain against a rival trader in regard to any announcement he makes concerning the goods which he sells, so long as no statement is made which is untrue, or calculated to mislead. But besides making use of ordinary language and their own names, in order to announce to the public what they wish to make known with respect to their goods, traders are in the habit of resorting to a variety of devices in order to catch the eye of the public, and to represent to them in a striking manner what they wish to announce. Sometimes they wrap their goods in a fanciful cover, sometimes they impress upon their goods a fanciful name, at other times a fanciful plant or animal; and when a trader specially selects and appropriates to himself for the purpose of distinguishing his goods a device of this kind, that device becomes his trade-mark proper, and no one else is allowed to use it. But if, without any such special selection and appropriation, the goods of the trader do in fact happen to bear some particular mark, and this mark has come to be associated by the public with this trader's name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any person to use a mark of this latter description any more than it will allow him to use a rival trader's trade-mark proper and for this reason, because in either case there is made, or there is assumed to be made, a representation to the public which is false, namely, that the goods which are the goods of one trader are the goods of another. But

¹ *Ewing & Co. v. Grant Smith & Co.*, 2 Hyde, 185 (1864); see report of case in 1 Hyde, 1 (1863).

this distinction has been drawn between these two cases. If it be shown that a trader has infringed a rival trader's trade-mark proper, that is to say, the mark which another trader has specially selected and appropriated for the purpose of distinguishing his goods, the Court will, without further evidence, at once interfere, taking it for granted that such a proceeding is calculated to deceive the public; whereas, if the mark be one which has not been specially selected and appropriated by the trader for this purpose, evidence must be given to show that the mark was so understood by the public as to make it clear that the proceeding had either deceived, or was at least calculated to deceive, the public. Marks of both these kinds are usually called trade-marks and the distinction between the two cases is not one of principle, but it is one which is convenient when examining the evidence by which it is sought to prove the infringement."¹

"The general principles on which the Court gives relief in cases of trade-mark are to be found in *Perry v. Truefitt*,² *Croft v. Day*,³ *Leather Cloth Company v. American Leather Cloth Company*.⁴ These principles are applied to different classes of cases—*first*, to those of imitation of the entire trade-marks, about which no question could exist; *secondly*, to imitation so nearly resembling the entire original as to be colourable though not fraudulently so [*Millington v. Fox*;⁵ of which *Croft v. Day*⁶ is an example]; *thirdly*, to a class of cases where the entire original was not very closely copied, as discussed in *Leather Cloth Company v. American Leather Cloth Company*.⁷..... Then there are cases governed

¹ *Ralli v. Fleming*, 1. L. R., 3 Cal., 430, 431 (1878); see *Barlow v. Gobindram*, 1. L. R., 24 Cal., 374 (1897).

² 6 Beav., 66.

³ 7 Beav., 84.

⁴ 11 H. L., 538.

⁵ 3 M. & C., 338.

⁶ 7 Beav., 84.

⁷ 11 H. L., 538.

by the subordinate principle enunciated by Lord Cranworth in *Seizo v. Provezende*,¹ viz. :

'I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer (an importer I hold to be the same) have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device.' This principle is recognized in *Ralli v. Fleming*,² *Orr Ewing & Co. v. Johnston & Co.*,³ *Ford v. Foote*,⁴ *Edlesten v. Edlesten*,⁵ *Kinahan v. Bolton*,⁶ *Braham v. Bustard*,⁷ *Wotherspoon v. Currie*.⁸ In *Cope v. Evans*,⁹ where the question was to the use by defendant of the word 'Prairie' on cigar boxes, which word plaintiff had used in conjunction with other words, none of the principles above referred to were disputed, but were admitted by Sir Charles Hall, V. C. On the evidence he held that the use of the word 'Prairie' was not calculated to cause defendant's tobacco to bear the same name as the plaintiff's tobacco, or to cause defendant's tobacco to be passed off as plaintiff's."¹⁰ No trader importing goods can lawfully adopt a trade-mark which is calculated to cause his goods to bear in the market the same name as those of a rival trader.¹¹

The question of the right to the exclusive user of a trade-mark or trade-number is largely, if not entirely, a question of fact, and the question whether it exists in any

¹ L. R., 1 Ch. App., 196.

² L. R., 3 Cal., 417.

³ L. R., 13 Ch. D., 434, subsequently confirmed on appeal, L. R., 7 App. Cas., 219.

⁴ L. R., 7 Ch., App., 611.

⁵ 1 DeG. J. & S., 185.

⁶ 15 Ir. Chanc. Rep., 75.

⁷ 1 H. & M., 447.

⁸ L. R., 5 H. L., 508.

⁹ L. R., 18 Eq., 138.

¹⁰ *Taylor v. Virasami*, L. L. R., 6 Mad., 110, 111 (1882).

¹¹ *Ib.*

given case must depend upon whether the evidence in that case is sufficient to show such an association or connection between the mark or the number, and the firm which uses it as to indicate to the ordinary purchasers in the market that the goods are the goods of that particular firm. To show that a particular trade-number has acquired a reputation in the market, and that purchasers buy the goods by that number and not from an examination of the nature or quality of the cloth, is not sufficient to establish the right of exclusive user of that number. There must be such an association between the number and the firm's name as to indicate in the understanding of the public that the goods bearing that number came from that particular firm. The right of exclusive user of a name or a number as a trade-mark is not an absolute and unqualified right which would entitle the owner to prevent another person from using it under all circumstances. It is only when the use of that name or number deceives or is reasonably likely to deceive the public that it can be interfered with or prevented. There must be a reasonable probability of purchasers being deceived, it is not enough to show a mere possibility of deception.¹

In the undermentioned case² the plaintiffs from 1872 imported and sold an article described as 7½lbs. grey shirtings and marked as follows: "In the centre of each piece of cloth is a stamp in blue colour of a turtle in a star with the words 'trade-mark;' immediately underneath, in a semi-circular form, is the name 'Fleming, Galbraith & Co., Manchester,' and under this the number 39 within a star, and at the bottom of each piece the number 2,008." In 1877 the plaintiffs discovered that the defendants were importing from the same manufac-

¹ *Barlow v. Gobindram*, I. L. R., 24 Cal., 364 (1897).

² *Ralli v. Fleming*, I. L. R., 3 Cal., 417 (1878).

turers, and selling cloth of a similar quality marked as follows : "A stamp in blue colour of a rose in a square ; underneath are the words 'Ralli and Mavrojani' arranged in a semi-circular form, and under this the number 39 in a star and at the bottom the number 2,008.'" On the facts of the case the lower Court (Macpherson, J.) granted an *interim* Injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiff's mark and calculated to mislead the public ; and on appeal the Court (Garth, C. J., and Markby, J.) upheld that decision so far as to continue the Injunction. *Held per* Garth, C. J. : If the imitation of the plaintiff's marks generally, or the use of the number 2,008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs. *Per* Markby, J. : The number 2,008 was not part of the plaintiff's trade-mark proper, nor on the evidence was it so associated with the plaintiff's name as to indicate to the public that the goods bearing that number came only from the plaintiff's firm as importers. On the evidence it was merely a quality mark, and therefore not calculated to mislead the public into the belief that they were purchasing the plaintiff's goods, while in fact they were purchasing those imported by the defendants.

In the undermentioned case¹ the plaintiffs sued the defendant for an infringement of their label used on tins of aniline dye, which they imported into Bombay. The

¹ *Badische Aniline and Soda Fabrik v. Manekji Shapurji Katrak*, I. L. R., 17 Bom., 584 (1893).

label covered the top of the tin, and bore upon it the picture of an elephant in the centre of a curved band: the rest of the label being a combination in green, red and gold, representations, for the most part, of coins, medals and tracing. The defendant was the agent in Bombay of Cassella & Co., of Frankfort. Prior to 1892 Cassella & Co. had imported aniline dye into Bombay in tins bearing a label, the chief feature of which was an elephant. Of that label, however, the plaintiffs did not complain. But in January, 1892, Cassella & Co. adopted a new label, also bearing the picture of an elephant, different in some respects from the picture on the plaintiffs' label and with new surroundings, to none of which taken separately, did the plaintiffs object, but they complained that in its general effect this new label was so similar to their trade-mark as to amount to a colourable imitation thereof, and to be likely to deceive purchasers. It was held that the plaintiffs were entitled to an Injunction against the defendant. It was also held by Sargent, C. J., who referred to the remarks of Lord Selborne in *Johnstone v. Orr Ewing*:¹—That the question in a case of this description is not what would be the effect on brokers or even dealers in Bombay, but how the label would be likely to strike incautious or unwary purchasers, such as are to be found more particularly in the mofussil, that the attention of such purchasers would be arrested by the general effect of the label, and that, notwithstanding such differences as undoubtedly existed in respect to the colour and size of the elephant and in some other respects, would regard the labels as symbolical of the plaintiffs' goods. It was also held by Starling, J., that it is quite possible for a label, no part of which is a copy of another label, to be a colourable imitation of

that other label, and to be so like it in general appearance as to be likely to deceive purchasers.

The Court in dealing with a motion for a temporary Injunction will endeavour as much as possible to avoid prejudicing the defendant's case at the hearing of the cause when the Court may probably be supplied with fuller materials than it has upon the motion for ascertaining the truth.¹

The interference of the Court by Injunction being founded upon purely equitable principles, no Injunction will be granted when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court.² So a plaintiff who in other respects would be entitled to obtain a remedy against an infringer may yet be deprived of his right by reason of some fraudulent statement contained in his own trade-mark.³ Again delay and acquiescence may deprive a man of his right to the protection of the Court.⁴ Inasmuch as however in a case where no proof of actual deception is produced, the Court has to try a hypothetical case, turning on the probabilities of deception, as to which witnesses could probably be brought forward by both sides—a person who believes others to be infringing his trade-mark is entitled to wait until he can collect a sufficient number of cases to prove to the Court that the proceedings of which he complains do actually deceive the public.⁵ Even if the delay has not been such as to disentitle the plaintiff to his Injunction, it may yet obtain indulgence for the defendants, or the account or damages may

¹ *Ralli v. Fleming*, L. L. R., 3 Cal., 422, 423 (1878).

² Act I of 1877, s. 56, cl. (j). See *Kerr, Inj.*, 411.

³ See Ill. (c) to s. 56, Act I of 1877: *Perry v. Trusfitt*, 6 Beav., 66; *Pid-*

ding v. How, 8 Sim., 477; and other cases cited in *Sebastian, op cit.*, 228; *Kerr, Inj.*, 411.

⁴ See cases cited in *Sebastian, op cit.*, 222; *Kerr, Inj.*, 414.

⁵ *Lee v. Haley*, L. R., 5 Ch., 155, 160

be withheld, or the plaintiff may be left to pay his own costs.¹

The owner of a trade-mark may be, in respect of that mark, as in respect of any right, estopped by his conduct from denying the title of another person. So where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market, it was *held* that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market.²

An action for an Injunction may be brought against an agent or against a person employed in effecting only a part of the transaction such as a person employed to engrave or print spurious labels or marks, or against an innocent person, such as carrier, shipowner, wharfinger who may have temporary possession of the articles impressed with a spurious trade-mark; and a person who at the desire of another imposes upon goods a trade-mark which belongs to a third party, may be made a party to the action along with his principal.³

Patent.

§ 90. A trade-mark differs from a patent in many respects. "In the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say, 'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does not necessarily follow that the plaintiff can claim damages for every article

¹ *Sebastian, op. cit.*, 227, 228; and generally as to costs see *Kerr, Inj.*, 424.

² *Laverne v. Hooper*, 1 L. R., 8 Mad., 149 (1884).

³ *Kerr, Inj.*, 408.

manufactured by the defendant, even though it be under that mark. On the other hand, every sale without license of a patented article must be a damage to the patentee."¹ In the case of a trade-mark "the property and right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold and not in the article which is manufactured and sold."²

The benefit conferred upon the public by the communication of a new invention, which after a limited period all can use, is the consideration in respect of which a monopoly of the invention is granted to the inventor for that limited period.³

The law of British India relating to inventions is now contained in Act V of 1888, the Inventions and Designs Act, of which the first forty-nine sections deal with Inventions and the remaining sections, being an adaptation of Part III of the English Act of 1883, deal with Designs. The prior Act XV of 1859, an Act for granting exclusive privileges to inventors in India, as regards substantive law, followed for the most part with variations the main lines of the English law. As regards the procedure for obtaining an exclusive privilege it was altogether different from the English Procedure. On petition and leave given to file a specification, and on the specification being filed within the prescribed period the exclusive privilege sprang into existence by mere operation of law, provided, of course, that the claim was well founded in substance—a matter of which the claimant, as in England, took the risk. Though during the

¹ *Davenport v. Rylands*, L. R., 1 (Amer.)
Eq., 302, per Wood, V. C.

² Sebastian on Trade-Marks, citing
Godillot v. Hazard, 49 How. Pr., 5

³ *Chearin v. Walker*, 5 Ch. D., 860,
863.

period, exceeding a quarter of the century, for which the Act of 1859 was in operation, it worked on the whole satisfactorily, difficulties from time to time arose, and the increasing resort to the Act in and prior to the year 1887 brought them into greater prominence. Though these difficulties were not of such a kind as to require in the opinion of Government any alteration which would affect the main principles of the Act, still as their removal was very desirable, it was decided to pass the present Act and to incorporate in it certain provisions suggested by the Patents, Designs, and Trade-Marks Act, 1883, which was then the law in England.¹

An invention includes an improvement.² The inventor of a new manufacture may apply for leave to file a specification thereof.³ The object of a specification is to prevent a patent being granted for known things and to secure to the public the benefit of the invention after the expiration of the time fixed for the duration of the monopoly. Upon such application the Governor-General may, after such enquiry as he thinks fit, make an order authorising the applicant to file a specification of the invention.⁴ If within six months from the date of such order, or within the further time allowed, the applicant duly files a specification of his invention, he is entitled

¹ Statements of Objects and Reasons, Inventions and Designs Bill, *Gazette of India*, Jan. 8, 1887, Part V, p. 15. See also *Gazette of India*, Feb. 18, 1888, Part V, p. 3. See the following decisions passed under that Act: *Kinmond v. Jackson*, 1 C. L. R., 66 (1877); [Improvement—Useful invention—novelty—piracy—patent combination—Injunction, account of profits—damages—Limitation]; S. C., I. L. R., 3 Cal., 17 (1877) [Limitation]; *Sheen v. Johnson*, I. L. R., 2 All., 168 (1879) [License—measure

of damages—"publicly or actually used"—particulars]; *Petman v. Bull*, I. L. R., 5 All., 371 (1883) [Jurisdiction—particulars]. *Ledgard v. Bull*, I. L. R., 9 All., 191 (1886) [Jurisdiction—particulars]. In the matter of *D. H. R. Mcees*, I. L. R., 15 Cal., 244 (1888) [License].

² Act V of 1889, s. 4 (1).

³ *ib.*, s. 5; as to applications in respect of contemporaneous inventions, see s. 7, *ib.*

⁴ *ib.*, s. 6.

to the exclusive privilege of making, selling and using the invention in British India, and of authorising others so to do for a term of fourteen years from the date of the filing of the specification.¹ Under certain circumstances the exclusive privilege may be extended for a further term not exceeding seven, or in exceptional cases, fourteen years.² A person is not entitled to an exclusive privilege if the invention is of no utility, or is not new, or the applicant is not the inventor, or if the specification is not in order, or if his application contains a wilful or fraudulent mis-statement, or if the application for leave to file the specification was made after one year from the date of the acquisition of an exclusive privilege in respect of the invention in any place beyond the limits of British India and the United Kingdom.³

§ 90. An inventor may institute a suit in the District Court against any person who, during the continuance of an exclusive privilege acquired by him under this Act in respect of an invention makes, sells, or uses the invention without his license, or counterfeits or imitates it.⁴ And any person may apply to a High Court for a rule to show cause why the Court should not declare that an exclusive privilege in respect of an invention has not been acquired.⁵ In such a suit for infringement of patent the plaintiff may claim an Injunction and either an account of profits or damages. So if *A* infringes *B*'s patent, if the Court is satisfied that the patent is valid and has been infringed, *B* may obtain an Injunction to restrain the infringement.⁶ In order to warrant the interference of the Court by Injunction in support of a

Injunctions
against in-
fringement of
Patents.

¹ *ib.*, s. 8.

² *ib.*, s. 15.

³ *ib.*, s. 20.

⁴ *ib.* s. 29: as to the delivery of

particulars in such a suit, *see* s. 37, *ib.*

⁵ *ib.*, s. 30.

⁶ Act I of 1877, s. 54, III. (a).

patent right, it is necessary to make out a good *prima facie* title and either a fair *prima facie* case of infringement or that the defendant intends or threatens to infringe the patent, for if the latter fact is established an Injunction will be granted even although no actual infringement has taken place. Infringement involves substantial identity with the subject of the privilege. There must in this as in every other case have been no delay or acquiescence, and the conduct of the applicant and his agents must not have been such as to disentitle him to the assistance of the Court. In addition to an Injunction a patentee can have an enquiry into damages or an account, but he cannot have both.¹

¹ See generally Kerr, Inj., 295—345.

CHAPTER XII.

INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

§ 91. SUMMARY OF PRECEDING CHAPTERS. § 92. INJUNCTIONS TO STAY WRONGFUL ACTS OF A SPECIAL NATURE.

§ 91. The preceding Chapters have dealt with the issue of Injunctions in those instances in which the jurisdiction has been most frequently exercised. These are firstly cases in which the Injunction has been sought in restraint of judicial proceedings, and secondly those in which it has been sought in respect of matters other than judicial proceedings. The latter class of cases includes Injunctions against the breach of contract and the commission of civil wrongs or torts. Of such wrongs a selection has been made of those only which are of common occurrence, viz., defamation, waste, trespass, nuisance, copyright, trade-mark and patent.

§ 92. It must not, however, be supposed that relief by Injunction is in any manner limited to the class of cases hereinbefore specifically dealt with. Such relief is given to prevent a party from doing that which he is under an obligation not to do. There may be, and in fact are, many obligations of a special nature, other than those already dealt with, the breach of which may be restrained by Injunction.

So where the plaintiffs sued for an Injunction to prevent the defendant from interfering with their right

to present to certain persons at a certain festival in a certain temple a crown and water, and the lower Courts found that the plaintiffs possessed the right claimed and granted the Injunction; it was held that the suit was cognizable by a Civil Court under section 11 of the Code of Civil Procedure and that the Injunction was properly granted.¹ So where a certain section of the Mahomedan community had been for many years in the habit of burying their dead near a *darga* in the plaintiff's land, the plaintiff sued for an Injunction restraining them from exercising this right in future.² In the under-mentioned case the plaintiffs sued for an Injunction restraining defendants from obstructing them in cutting certain branches of a pepal tree, growing in the enclosure of a temple and stated to be an object of veneration but which overhang their property.³ Again the North-West Provinces and Oudh Municipalities Act, 1883, not conferring the powers given by Act XV of 1873, to "cancel or vary" a tax imposed, the procedure to be adopted for the enhancement of an existing tax must be the same as that prescribed for the imposition of a new tax. In imposing a new tax the procedure laid down in section 42 of Act XV of 1883 must be strictly followed. Where, therefore, neither the special meeting of the Board at which an assessee's objections to a proposed tax were considered nor the special meeting at which the tax was finally imposed, were properly constituted within the meaning of section 29 of Act XV of 1883, it was held that the imposition of the tax was invalid and that there was nothing in the Specific

¹ *Srinivasa v. Tiruvengada*, I. L. R., 11 Mad., 450 (1888); see also as to Injunction against intrusion into an office: *Raja Valad Shivappa v. Krishnabhat*, I. L. R., 3 Bom., 232

(1879).

² *Mohedin v. Shivalingappa*, I. L. R., 23 Bom., 666 (1899).

³ *Behari Lal v. Ghosa Lal*, I. L. R., 24 All., 499 (1902).

Relief Act to prevent the High Court from granting an Injunction against a municipality as part of the remedy in a regular suit.¹ Injunctions have also been granted between husband and wife, against parents with respect to the custody and education of children relating to marriage, ships, and other matters too numerous to be mentioned.² In fact it may be generally said that there is no legal right in respect of which under proper circumstances an Injunction may not be the appropriate remedy.

The Specific Relief Act provides a remedy by Injunction for the breach of *any* obligation whatever—an obligation being defined to include every duty enforceable by law. In each case, therefore, it is necessary to ascertain firstly, whether or not there is any obligation existing in favour of the applicant for an Injunction; secondly, whether or not there has been a breach or a threatened breach of such obligation. If these two facts are made out, then an Injunction may be asked for and obtained provided the circumstances of the particular case, in which these facts are established, are such as to warrant the grant of this particular form of relief according to the general principles contained in Chapter X of the Specific Relief Act.

¹ *Strachey v. Municipal Board of Calcutta*, I. L. R., 21 All., 348 (1899).

² See Kerr, Inj., Ch. XXIII [Injunctions to stay wrongful acts of a special nature].

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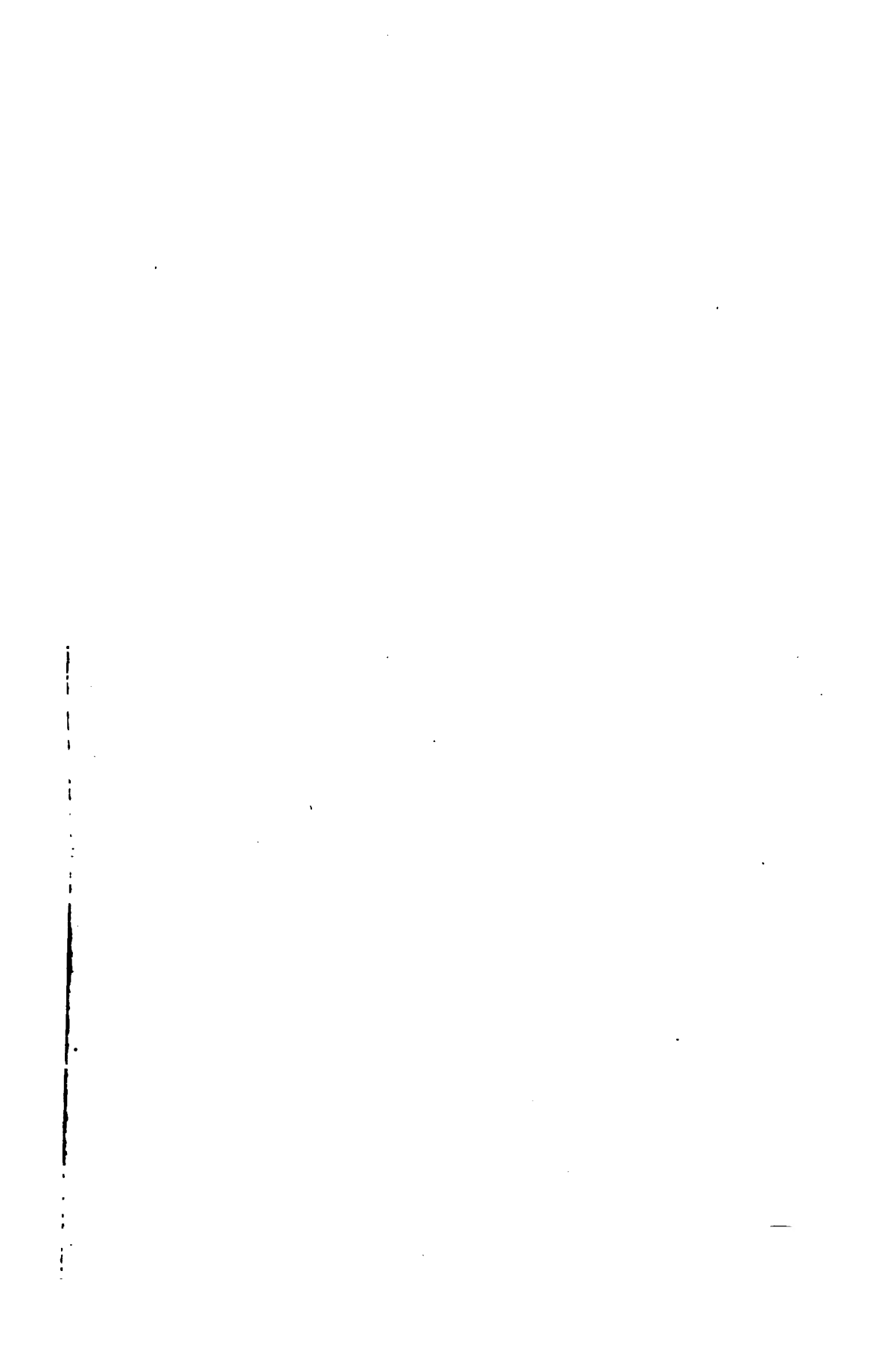
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